

***United States Court of Appeals  
for the Second Circuit***



**PETITIONER'S  
BRIEF**





Corrected Copy

# No. 76-4278

## United States Court of Appeals

FOR THE SECOND CIRCUIT

REA EXPRESS, INC., BANKRUPT,  
C. ORVIS SOWERWINE,  
TRUSTEE IN BANKRUPTCY,

*Petitioner,*

v.

UNITED STATES OF AMERICA and  
INTERSTATE COMMERCE COMMISSION,

*Respondents.*

Petition for Review of Orders of the  
Interstate Commerce Commission

### BRIEF OF THE PETITIONER

REA EXPRESS, INC., BANKRUPT,  
C. ORVIS SOWERWINE, TRUSTEE  
IN BANKRUPTCY, PETITIONER

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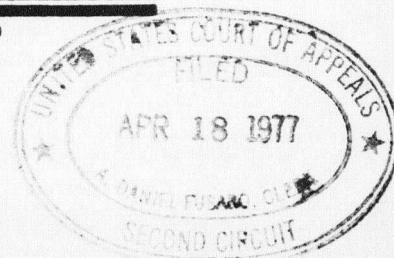


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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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REA EXPRESS, INC., BANKRUPT,	)	
C. ORVIS SOWERWINE, TRUSTEE	)	
IN BANKRUPTCY,	)	
Petitioner	)	
	)	
v.	)	No. 76-4278
	)	
UNITED STATES OF AMERICA	)	
and INTERSTATE COMMERCE	)	
COMMISSION,	)	
Respondents	)	

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BRIEF OF THE PETITIONER

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This matter is before this Court on Petitions for Judicial Review of the Report and Order of the Interstate Commerce Commission decided November 17, 1976, served November 19, 1976 and the Order dated January 27, 1977, served January 28, 1977 which denied petitions for reconsideration of the report and order entered November 17, 1976. 1/ The Orders under review found the Trustee in

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1/ J.A. 709, 838. References to the record before the Commission are to the Joint Appendix. References to the record before the Commission are to the Joint Appendix (J.A.) or, where material was not designated for inclusion in the Joint Appendix, to the Certified Index. Because there are five separate proceedings each with a document - index filed with the Court by the Secretary of the ICC, references to the certified document index in the "lead" Docket No. MC-C-8862 will merely show "Index" followed by the document number and page reference where necessary. References to the other proceedings, where necessary, using "Index Sub 2308" for MC-66562 (Sub 2308TA); "Index MC-C-8864" or MC-8867, or MC-8874 for the other complaint proceedings.

willful violation of the Interstate Commerce Act, revoked the principal temporary authority and dismissed the related permanent authority application under which REA Express, Inc. had been operating for over seven years from 1968 to November 1975.

Unless the two Orders of the Interstate Commerce Commission under review here are reversed, enjoined, annulled and set aside, the authority under which nationwide express service had been provided and could be provided in the future will be terminated. Unless the Commission's Decisions are reversed, express service will cease forever throughout the United States to the detriment of the general shipping public. Unless the Commission's Orders are reversed, enjoined, annulled and set aside by this Court on Judicial Review the single potentially most valuable asset of the bankrupt estate, i.e. its operating authorities, will be forever lost to the estate and all employees and former employees of REA Express, Inc., bankrupt, will be unemployed forever.



3.

I.

#### STATEMENT OF THE ISSUES

The issues presented to this Court on review are as follows:

1. Whether there is a demonstrated breach of the Commission's Rule of Procedure, Rule 247(f), which justifies (1) dismissal of the Hub permanent application and (2) the related termination of the temporary authority on which all nationwide express service was lawfully provided for over seven years from 1968 to 1975.

2. Whether there is evidence to support the Commission's conclusion that there was a repudiation of the Hub permanent authority application.

3. Whether dismissal of an application and the related termination of temporary authorities, under which REA operated from 1968 until bankruptcy in November 1975 and which would be operated by a proposed substitute applicant, can be based on an alleged 1971 repudiation of the application when an alternative application was filed and denied.

4. Whether there is evidence to support the finding of willful behavior on the part of REA Express, Inc. of

a nature and magnitude to justify revocation of the basic authority on which all nationwide express service was lawfully provided for over seven years from 1968 to November 1975.

5. Whether the temporary authorities on which nationwide express service was performed for over seven years from 1968 to 1975 could be revoked without following the notice and compliance procedures of 5 U.S.C. Section 558.

6. Whether there is evidence to support the finding of willfulness in the found violations sufficient and of a nature to waive the notice and compliance provisions of the Administrative Procedure Act, 5 U.S.C. Section 558, before revocation of temporary authorities on which nationwide express service was lawfully provided for over seven years from 1968 to November 1975.

7. Whether REA's lack of financial success and even bankruptcy constitutes a lawful basis to terminate the authority on which nationwide express service was provided from 1968 to November 1975 through dismissal of the permanent application and termination of the corresponding temporary authority where it appears there was a fit, willing and able substitute seeking authority to operate for REA and ultimately purchase and operate the entire authority.

8. Whether REA received adequate notice and adequate opportunity to be heard on (a) specific allegations of



wilfullness, (b) specific alleged violations, (c) the possibility that all its authority might be revoked or terminated if violations are found and they are judged willful, (d) REA's fitness, willingness and ability as well as the public need for its services and whether other carriers have expanded to fill the needs were in issue, (e) whether the dismissal of the permanent application and the cancellation of the corresponding temporary authority would amount to a severe detriment to the shipping public were in issue and would be decided, and (f) whether the possibility of a new application by another carrier under Section 210a(a) and Section 207 could be a grounds for dismissing REA's application and cancelling REA's corresponding temporary authority.

9. Whether in deciding all issues the Commission gave adequate consideration to the public policy expressed in the National Transportation Policy to provide for fair and impartial regulation of all modes of transportation to recognize and preserve the inherent advantages of each.

## II. STATEMENT OF THE CASE

### A. Nature Of The Case

This proceeding is before the Court on petition for judicial review of two Orders of the Interstate Commerce Commission resulting from four separate complaints and two separate petitions filed with the Commission.

The paramount fact to be kept in mind in reviewing the Commission's Orders and the pleas of the parties is that the proceedings before the Commission reflect an unabashed, no-holds-barred, concerted effort on behalf of the motor common carriers of this nation, spear-headed by the American Trucking Associations, Inc. under alleged authorizations from those associations, to bring about the immediate and prompt termination of any and all operations, i.e. cause the immediate demise, put out of business, and permanently end any potential for the continued operation of a nationwide, full-spectrum express service by REA Express, Inc., the destruction of an entire mode of transportation. These cases reflected yet one more chapter in a long battle undertaken by the motor carrier industry to accomplish this result. The Commission proceedings are properly characterized as a concerted effort by private groups of trucking companies not only to restrain, but to eliminate the competition it faces from REA by using



governmental processes to overburden and destroy that competition. 1/

In Docket No. MC-C-8862, Brada Miller Freight System, Inc. v. REXCO, Inc. and REA Express, Inc. the complaint filed November 25, 1975, alleged unlawfulness only in the REXCO division. 2/ The complaint only prayed for an order commanding the defendants "to cease and desist from the aforesaid violations of said Act" plus the boilerplate request for such other and further orders as may be considered in the premises. No request for revocation of REA's express authorities was made. The other complaints in Docket No. MC-C-8864, Schneider Transport, Inc. v. REA Express, Inc., filed November 28, 1975, Docket No. MC-C-8867, American Trucking Associations, Inc. v. REA Express, Inc., filed December 5, 1975; 3/ and Docket No.

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1/ McLean Trucking Co. v. United States, 321 U.S. 67, 86-87 (1943); Minneapolis and St. L. R. Co. v. United States, 361 U.S. 173 (1959); Florida East Coast Railway Company v. United States, 259 F. Supp. 993 (M.D. Fla. 1966); Great Northern Pac. - Merger - Great Northern, 328 I.C.C. 460 (1966); Chesapeake and O. Ry. Co. - Control - Western Maryland Ry. Co., 328 I.C.C. 684 (1967).

2/ For the complete allegations of the complaints refer to J.A. 1, 843, 854, 865.

The allegations

of those complaints were summarized in the "Brief of C. Orvis Sowerwine, Trustee in Bankruptcy for the Defendant REA Express, Inc.," dated October 18, 1976, MC-C-8862, Index 115, pp. 5-10.

3/ The ATA complaint alleged that the "complaint is filed pursuant to the direction of ATA's Executive Committee as a result of action taken at its meeting held in Dallas, (cont.)

MC-C-8874, Associated Truck Lines, Inc., et al. v. REA Express, Inc., filed December 12, 1975, all alleged unlawful operations only in the REXCO division.

Each of the complaints sought only the issuance of an order "commanding the defendant to cease and desist" from the alleged violations plus a boilerplate request for such other orders as the Commission may consider proper. None sought revocation of REA's authority.

In Docket No. MC-66562 (Sub-No. 2314) and (Sub No. 2308-TA), REA Express, Inc., Hub-To-Hub Temporary and Permanent Authority Applications, American Trucking Associations, Inc., on December 1, 1975, filed a "Petition Seeking Dismissal of the MC-66562 (Sub-No. 2314) Permanent Authority Application and for Cancellation of the MC-66562

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3/ (Cont.) Texas, on November 4, 1975." Although there were repeated requests made at the hearing for the presentation of the minutes of any meeting or copy of any specific directive that authorized the action of the American Trucking Associations in either bringing the complaint or in filing the petition seeking the demise of REA, Counsel for ATA steadfastly refused to present such factual matter. REA submits that ATA failed to establish its standing and right to bring the actions or to present evidence before the Commission as an authorized activity of American Trucking Associations, Inc. Based on the entire transcript, it appears that the presentation for ATA is the independent act of counsel and one full time employee for ATA. (Index 115, p. 8)



(Sub-2308TA) Temporary Authority." 1/ In addition to the relief sought according to its title, the Petition also requested the Commission "to hold that such temporary authority is void and of no force and effect." ATA pleaded, since the publication of the permanent Hub Authority Application on November 23, 1968, and particularly since March 8, 1971 when REA filed the Sub-2337TA irregular-route authority application allegedly "repudiating the Hub concept", that "REA has made no effort to prosecute the Sub-2314 permanent Hub authority application," that "the continued pendency of the Sub-2314 permanent authority application violates the spirit and intent of that rule [Rule 247(f)] if not its literal terms"; that "the Sub-2308 Temporary Authority should be promptly cancelled having remained outstanding since the initial grant on April 3, 1968 only because Sub-2314 permanent authority has been in a pending status; that Sub-2314 application is pending "only because REA has made no attempt to prosecute it over a period of several years and, probably through oversight, it has not been dismissed for want of prosecution". ATA prayed and argued that the "Sub-2314 permanent authority application should be dismissed

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1/ Sub 2308, Index 94, J.A. 963

for want of prosecution, and the Sub-2308 temporary authority should be promptly cancelled." ATA's petition and its requested relief were in no way premised on any alleged unlawfulness, willful or otherwise, in the REXCO division or any REA operations. 1/

The total complaint allegations of specific violations of law were limited to (a) a violation of Section 203(c) providing that no person shall engage in for-hire transportation by motor vehicle in interstate or foreign commerce unless there is in force a certificate or permit authorizing such transportation; (b) a violation of Section 206(a)(1) which provides that no common carrier by motor vehicle shall engage in interstate or foreign operations unless there is in force a certificate of public convenience and necessity authorizing such operations. 2/ There was no contention that REA Express, Inc. does not have extensive authority. There were no allegations of any violations of safety regulations. There were no allegations that the admitted express service operations of REA prior to November

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1/ J.A. 963

2/ The allusions in the complaint filed by Schneider in MC-C-8864 to Sections 212(b), 216(b) and 1(4), relative to an alleged unlawful transfer of authority and any alleged nullification of just and reasonable classifications, would appear to be totally spurious, not supported by any evidence offered by the complainants/petitioner, and are to be considered as abandoned allegations.



7, 1975 were in any way in violation of law. The dispute raised by the complaints centered entirely around whether or not the operations of one portion of an overall service by REA Express, Inc., i.e. the operations of its REXCO division, could properly be performed as "express service" called for under the certificates. 1/

B. Procedural History

The history of these cases before the ICC shows these proceedings were consolidated by order of the Commission dated April 5, 1976, served April 8, 1976. 2/ An in-depth discovery process then ensued. That process can and must be properly described as the broadest, deepest, most far-reaching and unlimited discovery ever authorized and undertaken by private parties under the complaint procedures of this Commission. Interrogatories served by the complainants on February 9, 1976 were responded to on March 17, 1976. 3/ The pleadings filed February 9 by the complainants also sought the entry of an order directing the Trustee and others to produce and permit complainants to inspect

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1/ The ICC order, 11/17/76, creates the erroneous impression that the Trustee started REXCO in November 1975. It was started in August 1975 by REA, then a debtor-in-possession. The Trustee merely continued a going, profitable division.

2/ J.A. 47

3/ J.A. 21, 23

and copy specific documents in the nature of discovery. By order of the Commission served April 8, the Commission, Commissioner Murphy, ordered REA Express, Inc. and REXCO, Inc. 1/ to make available for inspection and copying by counsel for the complainant an extensive listing of documents set forth in Appendix A to that order. This was the broadest discovery order ever seen in a proceeding involving private parties before the Commission.

By order dated April 14, served April 27 the Bureau of Enforcement was "directed to participate as a party" in Docket Nos. MC-C-8862, 8864, 8867 and 8874 (but not in the proceedings related to the petitions of ATA) "for the purpose of developing the record." 2/

Under date of June 8, 1976 the attorneys for the complainants, in a single pleading, filed an unprecedented and totally extra-legal pleading entitled "Motion Seeking the Holding in Abeyance of Any Application Filed Under Section 210a(b) Seeking Approval of the Commission to Control, Purchase, Lease, Manage or Operate the Authorities Held by REA Express, Inc. Pending the Commission's Determination of the Above Complaint Proceeding and the Immediate Revocation of All Outstanding Temporary Authorities Held

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1/ J.A. 47. REXCO, Inc. is not subject to the jurisdiction of the ICC, is not a proper party and, by stipulation, was removed from these proceedings.

2/ J.A. 49



by REA Express, Inc." 1/ This pleading should have been rejected and/or treated by the Commission as the catalyst for a full investigation of the concerted activities of the complainants as called for by the antitrust laws. The pleading should have been rejected as seeking relief not countenanced under the law, which requires the immediate processing of all applications properly filed, particularly those under Section 210a(b) for emergency temporary authority.

Extensive discovery, review and copying of documents then followed with counsel for the complainants spending extensive time in the offices of REA particularly the REXCO division, reviewing various manifests, and other documents. Extensive copying of such documents was undertaken. Extensive summaries were prepared from these documents.

Extensive discovery investigation was also going forward at the same time, having been undertaken by the Interstate Commerce Commission through the offices of its Bureau of Operations and Bureau of Enforcement. Immediately after the declaration of REA's bankruptcy on November 6, 1975 several staff personnel from the Bureau of Accounts, Bureau of Operations, etc. reviewed the records and operations of REA. At that time, the REXCO division had been in operation since August of 1975, utilizing commodity Tariff 85, I.C.C.

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1/ J.A. 60

153 of the REXCO division of REA Express, Inc., which was issued May 16, 1975, effective June 15, 1976. Further extensive on-the-site investigation and review, supported by extensive field interviews with REXCO agents, customers, etc., were undertaken by the Bureau of Operations/Bureau of Enforcement. Extensive documents were copied. Abstracts were made of even more documents. The entire result of this investigation was submitted through the testimony of witness Louis B. Bussolati, Transportation Specialist with the Bureau of Operations,<sup>1/</sup> discussed to some extent in REA's Brief. <sup>2/</sup>

On June 7, 1976 the complainants filed a "Request for Immediate Oral Hearing" to which written reply was submitted on June 18, 1976. <sup>3/</sup> By order of the Commission, Commissioner Murphy, dated July 28, 1976, served July 29, 1976, the consolidated proceedings were assigned for oral hearing beginning on August 30, 1976 and the complainants, the American Trucking Associations, Inc., and the Bureau of Enforcement were ordered to serve their direct evidence and arguments by August 23, 1976, only one week prior to the hearing. <sup>4/</sup> It was further ordered by Commissioner

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<sup>1/</sup> J.A. 498

<sup>2/</sup> Index 115, p. 48-54.

<sup>3/</sup> J.A. 55, 68

<sup>4/</sup> J.A. 99



Murphy that REA should complete answers to Interrogatories Nos. I through V, previously filed June 21, 1976, on or before August 16 and "that the defendants shall be prepared to present their evidence immediately after the completion of above-noted direct presentation." 1/ The order further required that, except for extraordinary cause shown, no additional procedural orders were to be entertained prior to the start of the hearing and that "subject to the usual discretion of the hearing officer, the presentation of evidence shall be in accordance with the Commission's usual procedures." 2/

Even subsequent to Commissioner Murphy's order prohibiting further procedural orders, the complainants on August 10, filed a "Petition Requesting an Order to Take Deposition and Perpetuate the Testimony of Mr. Dan Kerrigan Pursuant to Rule 58 of the Commission's Rules of Practice, 49 C.F.R §1100.58." 3/ REA did not oppose, but agreed to, that request and the deposition was taken on August 12, 1976. The results of that deposition were never offered in evidence by the complainants.

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1/ J.A. 99

2/ Ibid.

3/ J.A. 101

On August 16 there was filed "Trustee's Answers, to Extent Possible as of August 16, 1976, to Complainants' Interrogatories Nos. I through V." 1/

Under date of August 19, 1976 the Trustee filed a "Petition for Reconsideration of Order of Commissioner Murphy served July 29, 1976." 2/ On August 20, 1976 there was filed a "Joint Reply of Complainants to Petition for Reconsideration dated August 19, 1976." 3/ By order of the Commission (Commissioners Murphy, Hardin and O'Neal did not participate), dated August 23 and served August 24, the petition for reconsideration of the order of Commissioner Murphy entered July 28 was denied. 4/ A "Further Petition for Reconsideration of Order of Commissioner Murphy Served July 29, 1976, and for Reconsideration of the Order of the Commission Served August 24, 1976, and Request for Expedited Action" was filed by the Trustee on that same date. 5/ On August 25, a "Joint Reply of Complainants to Petition for Reconsideration Dated August 24, 1976 and Motion to Strike Under Rule 101(f)" was filed by the Complainant. 6/

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1/ J.A. 107

2/ J.A. 122

3/ J.A. 142

4/ J.A. 316

5/ J.A. 310

6/ J.A. 317



By order dated August 26, served August 27, 1976, the Commission (Commissioners Murphy, Hardin and O'Neal did not participate), rejected REA's Petition seeking reconsideration of the order of the Commission entered August 24, 1976, and further ordered that the hearings "will proceed as scheduled. . .beginning on August 30, 1976 (length of hearing indefinite)." 1/

The net effect of the foregoing was that the defendant was afforded only one week in which to review and prepare cross-examination with respect to the evidence submitted by the complainants comprising 47 separately identifiable appendices (exhibits), comprising statements of 36 different witnesses to which were attached innumerable appendices, plus the prepared statement of one witness, Mr. Bussolati for the Bureau of Enforcement: totaling more than 1,000 pages. The procedural order commanded by Commissioner Murphy, upheld by the Commission, and enforced by the Administrative Law Judge, prevented the defendant from having even one day recess for the purpose of preparing and presenting any reply evidence. 2/

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1/ J.A. 321

2/ See J.A. 323, 461, 473,560. A slight, and the only, exception was made at the closing of the hearing on Wednesday, September 22 which permitted counsel to submit a late-filed exhibit of facts.

Evidence in written form was tendered by the complainants and the Bureau of Enforcement on August 23, 1976. 1/ Hearings began one week later on August 30, 1976 and continued daily until September 22, 1976. 2/ REA was given no opportunity of a recess to prepare its response. Briefs were due and filed October 18, 1976. 3/ Reply Briefs were due and filed October 26, 1976. 4/

On November 19, 1976 the "Report and Order of the Commission", decided November 17, 1976, was served. 5/ The Order, with a statutory effective and compliance date 30 days after the date of service, mandated three things: (a) that defendant REA Express, Inc., Bankrupt, C. Orvis Sowerwine, Trustee in Bankruptcy, be notified and require to cease and desist from all operations of the REXCO division of the character found to be unlawful and in violation of the Interstate Commerce Act, unless and until appropriate authority therefore is obtained, (b) that the "Hub System" application for permanent authority in Docket No. MC-66562 (Sub-No. 2345) (Part No. 181) be dismissed, and (c) that the

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1/ Also the complainants in presenting their case did not follow the order of presentation given to REA on August 24th and during the hearing itself. They made daily changes in the order in which their witnesses appeared, all without objection by the A.L.J.

2/ J.A. 323, 461, 473, 560

3/ Index 115, 117, 118, J.A. 606

4/ Index 119, 120, 121, 122

5/ J.A. 709



related temporary authority granted by order of June 3, 1968, as extended, in Docket No. MC-66562 (Sub No. 2308TA) be revoked. By the language of the order it was to be effective 30 days after the date of service, i.e. on December 19, 1976, Sunday.

Effective 12:01 AM on Thursday, November 25, 1976 REA entered an Embargo Notice applicable to the operations of the REXCO division with respect to all commodities and all classes of traffic to or from all territories and points over all routes. 1/ All operations of REA's REXCO division have been terminated. Neither reconsideration nor Judicial Review of the Commission's decision requiring REA to cease and desist from the REXCO division operations has been or will be filed. The Trustee has no intention to and will not operate the REXCO division. 2/

Other than seeking reconsideration of the finding that the operations of the REXCO division found unlawful were

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1/ See Appendix 1, attached hereto.

2/ The Trustee has not conceded that the overall operation of the REXCO division was totally unlawful as the Commission had heretofore defined unlawful and the scope of express service. The importance of the restoration of full scale express service to the general public outweighs the Trustee's belief that the REXCO division operations could be shown to have involved, at most, violations of a technical, de minimis nature or violations which were a matter of degree in the interpretation of "express service."

"willful", no reconsideration was sought regarding the Commission's findings and conclusions as to the lawfulness of the REXCO division operations. 1/ With the termination of the REXCO division operations, the unlawfulness of those operations became a moot issue except insofar as the found unlawfulness could support a willfulness finding.

Petitions for Reconsideration of its November 19 Order were filed with the Interstate Commerce Commission on December 13, 1976 by REA and on December 20 by Alltrans. 2/ The petitions for reconsideration were denied by the Commission's Order served January 28, 1977. 3/

This Court entered orders staying the effectiveness of the order of the Interstate Commerce Commission entered November 17, 1976, served November 19, 1976 in Docket No. MC-C-8862, et al. pending judicial review, insofar as that order (1) dismissed the application in Docket No. MC-66562 (Sub No. 2345) (Part No. 181) and revoked the temporary authority granted by order of June 3, 1968, as extended, in Docket No. MC-66562 (Sub 2308TA).

The dismissal of the "Hub System" application for permanent authority and the revocation of the related temporary authority will cause the immediate termination of the

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1/ J.A. 744. The complaints alleging unlawful operations are thereby satisfied. The complainants did not originally seek the destruction of REA's authority through dismissal of the "Hub" application and the revocation of temporary authorities as ordered by the Commission.

2/ J.A. 744, 757

3/ J.A. 838



motor carrier authority on which REA relied from 1968 to November, 1975 to provide nationwide express service. REA's Trustee, with Bankruptcy Court approval, has entered into a contract with Alltrans Express U.S.A., Inc. for the sale of REA's authorities to Alltrans as set forth in an agreement dated July 27, 1976. (Cf. Docket No. 75-B-253, In Re: REA Express, Inc., f/k/a Railway Express Agency, Inc., Bankrupt, Southern District of New York). An application for temporary authority under §210a(b) 1/ for I.C.C. approval of that transaction plus approval of a related application for authority for temporary operations is now pending before the Interstate Commerce Commission in Docket No. MC-F-13003, et al., Alltrans Express, U.S.A. Inc. - Contract to Operate and Purchase REA Express, Inc., C. Orvis Sowerwine, Trustee in Bankruptcy, and No. MC-99388 (Sub No. 11), Alltrans Express - U.S.A., Inc. - Petition for Substitution and Removal of Restrictions. The value of the contract to REA, if Alltrans operations are approved and conducted, ranges from an estimated minimum of \$2.5 million to upwards of \$11 million, depending on the success of the Alltrans operation. If an injunction against the Commission's Order of November 19, 1976 is not entered, these values will be irreparably lost to REA.

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1/ 49 U.S.C.A. §310a(b)

## III. ARGUMENT

A. Scope Of Judicial Review

It is well-recognized that judicial review of the decision of an administrative agency is of limited scope. Bowman Trans. v. Arkansas-Best Freight, 419 U.S. 281 (1974).

These limitations, however, must not be permitted to become tantamount to a "rubber stamp" approach to judicial review. Cincinnati, New Orleans & Texas Pac. Ry. Co. v. United States, 229 F. Supp. 572 (S.D. Ohio 1964), vacated on other grounds, 379 U.S. 642; NLRB v. Brown, 380 U.S. 278 (1965).

Deference to administrative expertise was not intended to result in an abdication of judicial obligation and power.

"The Court's role in review of agency action has often been characterized as 'limited', [citations omitted]. While that characterization counsels judicial restraint and deference to agency expertise, it must not be viewed as an abdication by the courts of an obligation to scrutinize carefully agency rulings and reverse those that do not comport in the due process or with fundamental justice." [emphasis added] Atkinson Lines, Inc. v. United States, 281 F. Supp. 39 (S.D. Ohio 1974)



The Administrative Procedure Act (APA) envisions a very delicate balance between the obligations of the reviewing court and deference to an administrative agency. Judicial deference to expertise is not boundless. Expertise is not sufficient, in and of itself, to sustain a decision.

Eastern Central Motor Carriers Ass'n v. United States, 239 F. Supp. 591, 594 (D.C. D.C. 1965)

"Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government can become a monster which rules with no practical limits on its discretion.' New York v. United States, 342 U.S. 882. Burlington Truck Lines v. United States, 371 U.S. 156, 167 (1962).

Judicial deference "cannot be allowed to slip into a judicial inertia." Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261 (1968).

The provisions of section 706 of the Administrative Procedure Act (APA), 5 U.S.C. §706, indicate that a reviewing court must "undertake a careful and deliberate scrutiny of an agency's decisions to insure compliance with law and the legislative mandate." Office Of Communications of United Church of Christ v. F.C.C., 465 F. 2d 519 (D.C. Cir. 1972). Section 706 of the APA sets forth six bases for

judicial reversal of an agency decision. To determine whether one or more of these bases should be applied to the decision under review necessarily requires a careful review of the action taken at the agency level. The steps to be taken were extensively discussed in Greater Boston Television Corporation v. F.C.C., 444 F. 2d 841 (D.C. Cir. 1970).

The first step is an examination of the procedural aspects of the agency's action to assure that fair notice and an opportunity to be heard have been accorded to the parties.

The second step is an examination of the evidence and the agency's findings of fact to determine whether the evidence supports the findings and provides a rational basis for the agency's inferences of ultimate fact. The function of the Court in the reviewing process is to assure that the agency gave reasoned consideration to all material facts and issues.

"Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making. [emphasis added] Id. at 851.

Another material factor is the legislative mandate, embodied in the National Transportation Policy, 49 U.S.C.



prec. §1, which is the "yardstick" by which all Commission actions are to be measured. Eastern Central Motor Carriers Ass'n v. United States, supra. It is the declared policy of Congress to develop, coordinate, and preserve a national transportation system adequate to meet the needs of the commerce of the United States. By its decisions here the Commission has effectively denied the American public the opportunity to utilize the entire express mode of transportation, a very unique and a very important type of transportation service, a service which, even in REA's declining years, was utilized to move more than 9 million shipments annually. When the decisions of the Commission are viewed in the light of this mandate, there can be little doubt that the Commission has failed to engage in the balancing of interests which is required to be an integral part of its decision-making process.

Fourth, it appears from the record that the Commission failed to give adequate consideration to the public convenience and necessity, a standard of paramount importance whenever the grant, suspension, or revocation of operating authority is at issue. In those instances where the public interest has been ignored or inadequately considered, the scope of judicial review is sufficiently broad to require its consideration.

"Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors."  
Michigan Consolidated Gas Co. v Federal Power Com'n, 283 F. 2d 204 (D.C. Cir. 1960)

The Commission's failure to give adequate consideration to the public need and desire for express service is a fatal error which, of itself, requires that the Commission's decision be overturned. 1/

Fifth, while the Commission has great discretion in its choice of remedies, this discretion is not limitless and the choice of remedy is subject to judicial review. See Burlington Truck Lines v. United States, 371 U.S. 156 (1962) in which the Supreme Court found that the Commission's chosen remedy was inappropriate in light of the circumstances. The Court reasoned that the remedy chosen

"... must be rational and based upon conscious choice that in the circumstances the public interest in 'adequate, economical, and efficient service' out-balances whatever public interest there is in protecting existing carrier's revenues in order to 'foster sound economic conditions in transportation and among the several carriers'. (National Transportation Policy, 49 U.S.C. preceding §§1, 301, 901, 1001), 371 U.S. at 167.

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1/ There is no support in the record for the finding that "other carriers have expanded to fill the void as REA's service eroded" J.A. 729 In fact, by the Commission's own definition ordinary motor carriers can not perform express service. J.A. 716



On the record which the Commission had before it, one of several remedies could have been pursued. If the Commission felt that there was sufficient evidence to warrant a finding that the REXCO division had engaged in unauthorized operations or other unlawful activities, it could have issued a cease and desist order, temporarily suspended all or a portion of REA's operating authority etc. There was neither precedent nor record support for dismissal and revocation.

Sixth, and finally, the "arbitrary and capricious" standard of §706 of the APA requires that a rational basis be found to exist between the facts elicited and the conclusions reached. In order to apply this standard of review, it is essential that the agency articulate with reasonable clarity the reasons for its decision and identify the significance of the crucial facts. Careful review of the Commission's orders of November 19, 1976 and January 28, 1977 fails to reveal any attempt by it to articulate the basis for its conclusions and the drastic remedy chosen. There is no evidence in the record that the Commission gave adequate consideration to the need of the public for express service. There is a passing reference to an unsupported assumption that other carriers have stepped in to fill the gap created by REA's bankruptcy. This fails to take into account the fact that, by the Commission's own definition, a for-hire

motor carrier cannot and does not provide express service. Further, there is no indication that there was any basis for the remedy chosen: revocation of operating authority without prior notice. There had been no prior cease-and-desist order and no prior suspension of authority. There was no evidence of fraud or any other intentional disregard of the rules and regulations of the Interstate Commerce Commission and the Department of Transportation.

As will hereinafter be clear, the Commission failed procedurally, provided no rational basis for its inferences of ultimate fact, failed to meet its legislative mandate, ignored public convenience and necessity, used the ultimate weapon of revocation of authority without prior warning or due process and, finally, acted in an arbitrary and capricious manner to destroy forever an entire mode of transportation, express service, when a ready, willing and able applicant was before it seeking to expand and resume that very same express service.

Therefore, those decisions must be reversed and remanded with directions from the Court that the ICC take into consideration in prospective proceedings before it all six criteria for judicial review.



B. There Has Not Been A Violation Of  
Rule 247(f) Of The Commission's  
Special Rules Of Practice, To Justify  
Dismissal Of The Permanent Authority Application  
And Revocation Of The Related Temporary Authority

A paramount issue here before the Court is whether or not the Commission can be sustained in finding that there has been a breach of the Commission's Special Rule of Practice, Rule 247(f), 49 C.F.R. §1100.247(f) of the nature and significance to justify dismissal of the Hub permanent application and the related termination of the temporary authorities on which nationwide express service was lawfully provided by REA for over 7 years from 1968 to 1975. The facts of record and prior Commission precedents simply do not support the Commission's conclusion that such a breach has occurred.

Rule 247(f) presently provides, in pertinent part:

"An applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof. Failure to prosecute an application under procedures ordered by the Commission will result in dismissal thereof."  
49 C.F.R. §1100.247(f)

An applicant is directed to request dismissal of its application if it does not intend timely to prosecute the same.

Here, the record in MC 66562 (Sub-No. 2314) (now designated as Sub 2345, Part 181) clearly reveals that REA

desired and intended to prosecute its application, notified the Commission of its intentions to proceed, 1/ participated in a prehearing conference 2/ in order to define the issues and to establish procedures for expediting the hearing, and indicated its readiness to proceed with the hearing. 3/ The Commission never set the matter for oral hearing. REA did not fail to meet the requirements of any procedural or other order duly issued by the Commission in that proceeding.

The Hub system application, totalling 1,276 pages, was filed with the Commission on May 29, 1968. 4/ Notice, consisting of 116 pages of synopsis, was published in the Federal Register on November 23, 1968. 5/ Numerous protests were subsequently filed by individual motor carriers in opposition to the application. 6/

On February 11, 1969, REA notified the Commission that it was ready to proceed and prosecute the above application. 7/

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1/ J.A. 879

2/ J.A. 888

3/ J.A. 919

4/ Sub 2345, Index 1

5/ Sub 2345, Index 12

6/ Cf. Sub 2345, Index 13-16, 18-23, 25-31, 33-89, 92-93, 102-105, 107-109, 111-170, 172

7/ J.A. 879



This notice, addressed to the Secretary of the Commission by REA's then Vice President and General Counsel, was filed pursuant to Rule 247(f) which, at that time, provided, in part, as follows:

"If protests to its application have been filed, applicant shall, within 30 days after the period for filing protests has expired, notify the Commission in writing (1) that it is ready to proceed and prosecute the application, or (2) that it wishes to withdraw the application. Failure so to notify the Commission will be construed to mean that applicant has no further interest in the application, and the application will thereupon be dismissed by the Commission."

By order of the Commission, served October 30, 1969, the proceeding was set for oral hearing beginning January 12, 1970.<sup>1/</sup> On November 26, 1970, in the light of the large number of protestants and the complex issues involved, counsel for REA requested that the Commission schedule a prehearing conference, to be held on December 18 or 19, 1969. <sup>2/</sup> By letter dated November 28, 1969, counsel for protestant McLean Trucking Company (successor to Herrin Transportation Company) suggested that, if it is necessary

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<sup>1/</sup> J.A. 880

<sup>2/</sup> J.A. 882

to have a prehearing conference, it be scheduled in January 1970 with the hearing to be held at a later date. 1/ In a Notice to the Parties, served December 10, 1969, the Commission thereafter cancelled the oral hearing scheduled for January 12, 1970, and substituted therefor the requested prehearing conference. 2/

The prehearing conference was held, as ordered on January 12, 1970, before Examiner McKiel and Chief Examiner Cheseldine. At that conference, REA counsel indicated they would be prepared to go forward with the case on March 30, 1970. 3/ When Chief Examiner Cheseldine questioned whether REA could go forward that quickly and indicated a desire for written testimony to be submitted 10 days in advance of any hearing, 4/ it was agreed that written testimony was to be submitted on April 20 and the hearing would take place on April 30, 1970. 5/ Since it was recognized that April 30 was a Thursday, it was agreed that the hearing should begin the following Monday. 6/ Chief Hearing Examiner Cheseldine specifically stated that:

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1/ J.A. 885

2/ J.A. 886

3/ J.A. 919

4/ J.A. 921

5/ J.A. 941

6/ J.A. 944



"With that understanding, we will set the operating testimony hearing shortly after the first of May and then we will move quickly forward after that." 1/ (emphasis supplied)

No prehearing conference report or order was ever issued. In addition, the Commission never issued an order fixing a time to hold the hearing on operating testimony. The ICC did issue several orders allowing intervention of additional parties. 2/ The Atomic Energy Commission received permission to intervene on May 7, 1970, a date which was long after the date discussed at the prehearing conference for the commencement of the oral hearings. 3/ Therefore the Commission itself contemplated the further postponement of those hearings and the submission of evidence by REA sometime after April 20, 1970.

According to the docket in Sub-No. 2345 (Part 181) no further ICC order issued in the proceeding for over four and one-half years. On January 9, 1975 the Commission on its own initiative issued an order consolidating numerous REA applications, including the original Sub-2314, into Sub-2345. 4/

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1/ J.A. 948

2/ J.A. 950,951,953,954

3/ J.A. 954

4/ J.A. 961

Sub 2314 was dismissed. 1/ Obviously, the "Hub System" application was still viable in January 1975, over 6-1/2 years after the original application.

The next order issued affecting the new Sub 2345 (Part 181) was the order by Commissioner Murphy served April 8, 1976 consolidating it with the complaints herein. 2/

The docket in renumbered Sub 2345 (Part 181) does contain a letter of August 23, 1974 3/ from the Deputy Director of the Section of Operating Rights in response to a request for information submitted by counsel other than the applicant's counsel, in which the Deputy Director states:

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1/ Ibid.  
The ATA Petition filed December 1, 1975 requested the dismissal of the application in Sub-No. 2314 for want of prosecution and the cancellation of the related temporary authority in Sub-2308TA as a coincidence of the dismissal of the application for permanent authority. That petition itself should have been dismissed as REA properly argued, because it was moot. There was no pending permanent application in Sub-2314, that application having been dismissed by Commissioner Murphy's Order dated January 9, 1975. REA was not, in fact, ever served with any petition specifically seeking the dismissal of Sub-No. 2345 (Part 181). The Commission, to assist ATA in its attack on REA, on its own motion accepted the petition to dismiss an application which was already dismissed, renumbered that petition into a pending case, and consolidated that case involving all REA's basic express authority with those complaints which were directed only against the REXCO division. Having saved the ATA petition from the rejection it deserved, the Commission subsequently used that petition as the basis for dismissing the entire authority.

2/ J.A. 47

3/ J.A. 960



"A prehearing conference was held in this matter on January 1[12], 1970. No date has been set for formal hearing in this proceeding. As you are no doubt aware, this application envisions a nationwide system of routes comprised of a multitude of both REA's presently held authorities as well as newly applied for operating rights. The problems thus raised by a proceeding such as this are as massive as the application itself.

"I regret that I am unable to suggest the processing time for this proceeding in the light of its unusual nature." (emphasis supplied)

The foregoing clearly demonstrates that any failure to process the application in 2314, or the subsequent consolidated 2345 (Part 181), is not attributable to the applicant in a manner that could, in any way, justify the dismissal of the application and the cancellation of the related Sub-2308TA. On the contrary, responsible officials within the Commission recognized that "the problems thus raised by a proceeding such as this are as massive as the application itself." The Report and Order of the Commission quoted an earlier Commission decision showing the magnitude of the problems posed by the Hub application which was "the largest single application in the history of this Commission. . . ." 1/ The magnitude of this application

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1/ J.A. 715

would clearly be a reason why the proceeding had not been set for hearing by the Commission. It would also explain the ICC's determination to find a way to dismiss the application at this time, because, even now, "the problems are as massive as the application itself."

The applicant's current desire to prosecute the application cannot be questioned in light of the application in Docket No. MC-F-13003, Alltrans Express U.S.A., Inc. - Contract To Operate & Purchase REA Express, Inc., C. Orvis Sowerwine, Trustee In Bankruptcy, including the request of Alltrans, an intervenor in this proceeding, to be substituted as applicant in the Sub-2345 (Part 181). Neither the original applicant, REA, nor the proposed substitute applicant, Alltrans, has failed to comply with all procedural requirements and orders of the Commission in the application proceeding. There has been no failure of applicant under Rule 247(f) to prosecute the application. The only failure demonstrated by the actual record has been the failure of the Commission itself to deal with a massive application that has (according to the Commission) massive problems.

The Commission erred in attempting to support its revocation of Sub No. 2308TA on the false ground that in



mid-1971 "in effect, it [REA] repudiated that [Hub] approach, and specifically expressed its intention to dismiss the Hub proceeding." 1/ The Commission has been fully aware of the fact, as alluded to in its recognition that REA "attempted to make a go of the 'Hub System' approach between June, 1968, and mid-1971", 2/ that over-the-highway service by the express company in its own vehicles was an absolute necessity for the continued provision of nationwide express service whether such operations were conducted in the precise configuration of the "Hub System", minor or major variations thereon, substantial modifications thereof, or based on an alternative system which might be considered as a "repudiation" of the "Hub" concept. Continued utilization of the rail system was totally unfeasible. Whatever possible incentive the railroads might have had to encourage rail express operations had diminished, if not totally disappeared, in 1969 when the railroads gave up their ownership (and domination) of REA. The need to immediately transfer tens of millions of shipments to intercity movement from rail to over-the-highway operations was apparent. The best manner in which such operations could be conducted in "express service" was not immediately and definitively

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1/ J.A 728

2/ Ibid.

conceived or determined. The "Hub System" concept never purported to be definitive and final. The Hub system concept was used however from June 1968 to November 1975. It is absurd to contend that an authority used until November 1975 and as to which there is a contract of sale and a proposed substitute operator, Alltrans, was repudiated in 1971. The Commission's finding of a repudiation and its use of such repudiation to support dismissal of the Hub application is irrational, arbitrary and capricious.

While the Commission undoubtedly has the power in proper circumstances to dismiss an application for failure to prosecute or for refusal to comply with its orders pursuant to Rule 247(f), such dismissal is clearly a drastic sanction which should be sparingly exercised. This has been the consistent holding of the Courts in analogous situations under Rule 41(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. See, e.g., Walsh v. Automatic Poultry Feeder Company, 439 F. 2d. 95, 96 (8th Cir. 1971); Grunewald v. Missouri Pacific Railroad Company, 331 F. 2d. 983 (8th Cir. 1964); Newport v. Revyuk, 303 F. 2d. 23 (8th Cir. 1962); Bowles v. Goebel, 151 F. 2d. 671 (8th Cir. 1945); Wright and Miller, 9 Federal Practice and Procedure §3370 at 199-217.

In fact, the Commission's use of this extreme sanction has been limited to situations where applicants failed to



comply with orders to proceed with hearings. See, e.g., C.E. Carroll Common Carrier Application, 3 M.C.C. 393 (1937); Traffic Motor Express Common Carrier Application, 1 M.C.C. 419 (1939); See also, New Rochelle Moving & Storage - Contract Carrier Application, 111 M.C.C. 418 (1970). In the instant matter, on the other hand, as earlier indicated, REA desired and intended to prosecute its application and so notified the Commission. Moreover, REA did not fail to meet requirements of any order issued by the Commission.

Pertinent here, the Courts have also held that where an action is presently being prosecuted with diligence it can not be dismissed because, at some earlier time, the plaintiff did not act diligently. See, Wright and Miller, 9 Federal Practice and Procedure §370, at 204.

Thus, even assuming, arguendo, that REA was not diligent in prosecuting its application, there can be no question that Alltrans, as substitute applicant for REA, is ready, willing and able to prosecute the application diligently. The Commission's dismissal of the Hub application was contrary to proper procedure, arbitrary, capricious, and unwarranted in law and fact.

C. The Commission Was Arbitrary  
And Capricious In Its Findings Of Willfulness  
In The Performance Of The Unlawful  
Operations Found In The REXCO Division  
And In The Commission's Use Of This Willfulness  
As The Basis For Revocation Of The Nationwide  
Authority Under Which Express Service Had  
Been Rendered For Many Years

REA's argument that the Commission's findings and use of "willfulness" in the performance of the unlawful operations of REA's REXCO division was erroneous, arbitrary and capricious and must be reversed is based upon several contentions: (1) the finding of willfulness in the violations is not supported by the record; (2) the finding is totally inconsistent with the Commission's treatment of other unlawful operations as to whether or not they are to be considered as "willful"; (3) the Commission's punitive use of the willfulness finding as the basis for revocation of the nationwide express authority, an entire transportation mode, is arbitrary and capricious as being totally inconsistent with its use of findings as to demonstrably unlawful operations continued to be performed after notice, hearings, after the entry of a cease and desist order as to other carriers; (4) even if violations can be found, arguendo, to be "willful", the Commission's use of the finding with respect to a minor aspect of the overall REA operation, as conducted both by the Trustee and his predecessors,



is punitive rather than remedial, is totally inconsistent with the purposes and objectives of the law, and is used, in an arbitrary and capricious fashion, to destroy the extensive authority on which nationwide express service has been provided in the public interest for many years on millions of shipments.

The Commission, in its January 28th order, sustained its earlier finding that the unlawful operations found to exist in REA's REXCO division were "willful". It relied upon the following points, each of which alone and collectively fail to support the reasonableness of, and fail to provide an adequate rationale for, the finding of willfulness: (1) "that first, (bankruptcy) court approval of the continuation of the REXCO Operations did not insulate defendant from the involved action", citing NLRB v. Baldwin L. Works, 128 F. 2d 39 3d. Cir. 1942); (2) "that second, even if it is assumed that the Commission's personnel made arguably favorable statements concerning the REXCO Operations, it is well-settled that the Commission cannot be bound by such statements and defendant cannot reasonably rely upon them such as to negate any willful aspect of its operations involved herein", citing USAC Transport, Inc. v. United States, 235 F. Supp. 689 (D. Del. 1964), aff'd per curiam 380 U.S. 450 (1965); (3) "that the

Commission's statement to the Bankruptcy Court referred to above indicated that the REXCO operations were under investigation, and for the Commission to have further qualified its statement would have been improper under the circumstances"; (4) "that nevertheless, that statement certainly was not a condonation of REXCO's unlawful operation"; (5) "that on the contrary said statement should have put a reasonable person acting in good faith on notice of the possible unlawfulness involved in those operations"; and (6) "that finally, there is substantial and convincing evidence of record to support the finding that the involved operations were totally unlawful, demonstrating, at the very least, a lack of supervision or such disregard of statutory regulation irrespective of evil intent or erroneous advice, constituting willful behavior on the part of defendant", citing Goodman v. Benson, 286 F. 2d 896 (7th Cir. 1961), and comparing United States v. Illinois Central Railroad Co., 303 U.S. 239 (1938).

It is submitted, overall, that each of these enumerated grounds upon which the Commission reaffirms its finding of willfulness totally misses the point.

REA did not and does not now contend that these various factors can or had been relied upon by REA to prove the lawfulness of the REXCO operations. On the contrary, when unlawfulness findings regarding the REXCO operations were made, which findings were not clearly forewarned or forestated by the case



law, the Commission's conduct, or the fact that competitors complained, etc., REXCO operations were immediately terminated. The point REA attempted to make, and which demonstrates the total irrelevance of the Commission's reassertion of grounds why the willfulness finding is supported, is that they individually and collectively mitigate against a finding of willfulness. They certainly negate any possible use of a "willfulness" finding as the basis to take the punitive action taken by the Commission in revoking the nationwide authority on which express service had been provided to millions of shippers on tens of millions of shipments over a long period of time. 1/

1. The Commission's Finding Of "Willfulness"  
Is Contrary To Prior Precedent Because It  
Was Without Notice, Prior Cease And  
Desist Order, Show Cause, Civil Forfeiture,  
Or Admonition.

The Commission's finding that the operations of the REXCO division constituted willful violations of the Act which warranted revocation of REA's operating authority represents a significant, unexplained departure from prior Commission practice. Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973). A lack of uniformity of treatment by an agency of similarly situated parties is clearly impermissible. Keen Transport, Inc. v. U.S., Civil Action No. C-75-170 (N.D. Ohio, 1976); R-C Motor Lines, Inc. v.

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1/ REA in its Petition for Reconsideration gave twelve reasons why the willfulness finding was erroneous which are incorporated herein by reference. J.A. 744-752

U.S., 350 F. Supp. 1169 (M.D. Fla. 1972), aff'd 411 U.S. 941 (1973); Fraenkel v. U.S., 320 F. Supp. 605 (S.D. N.Y. 1970); H.C. & D. Moving & Storage Co. v. U.S., 298 F. Supp. 746 (D. Haw. 1969); Interstate Contract Carrier Corp. v. U.S., 289 F. Supp. 1159 (D. Utah 1974); Squaw Transit Company v. U.S., 402 F. Supp. 1278 (N.D. Okla., 1975).

An extensive review of prior Commission decisions involving allegedly illegal operations has revealed only one instance in which the ICC alleged violations of the Act to be willful in nature, permitting the invocation of the sanctions found in §212(a) of the Act, in the absence of an outstanding cease and desist order and/or a long history of violations of the Act which were brought to the carrier's attention. See, Schreiber-Investigation of Operations & Revocation of Certificates, 125 M.C.C. 552 (September 30, 1976). 1/

In the Schreiber case, 125 M.C.C. 552, the Commission investigated allegations of operations beyond the scope of the operating authority and unlawful acquisition of control under §5(2); a substantial portion of the evidence submitted by the Bureau of Enforcement was intended to establish that the violations were not inadvertent.

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1/ In Schreiber the Commission had instituted the investigation in contrast to this case where motor carrier competitors filed complaints.



There were numerous examples of fraud which indicated that the carriers involved were aware of the Commission's rules and regulations and were deliberately altering documents to avoid compliance. In the initial decision, the Administrative Law Judge observed that there was little likelihood, in light of the evidence, that an order requiring compliance with the Act would be effective to prevent further violations. However, he concluded that since no prior cease and desist orders had been entered, resort to §212(a) would be inappropriate. It is interesting to note that, in its exceptions in Schreiber, the Bureau was able to cite only one case 1/ in which the sanctions contained in §212(a) had been invoked in a carrier's first investigatory proceeding. Further, the Quick case, cited by the Bureau, involved only a suspension of operating authority, not a revocation.

It appears that the Schreiber decision is the first printed decision in which the Commission has made a finding of willfulness in the absence of a prior Commission admonition or the entry of a cease and desist order. Schreiber does not establish an adequate precedent for the action taken by the Commission against REXCO. In the Schreiber case, even in the face of substantial evidence of fraudulent attempts to avoid Commission rules and regulations and the

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1/ Docket No. MC-C-8076, Quick Air Freight, Inc. - Investigation and Revocation of Certificate, (not printed), served July 19, 1974.

apparent consensus that a cease and desist order would be insufficient to assure compliance, the remedy chosen was a 45-day suspension of operating authority. Not even in a case involving patent, fraudulent disregard of the law did the Commission resort to the remedy of revocation of operating authority. In discussing whether the conduct in Schreiber was properly characterized as willful, the Commission, Division One, noted that "persistence in violations over a period of time, despite admonitions and enforcement penalties justifies characterizing the conduct under consideration as willful." 125 M.C.C. at 564. It is also significant that Schreiber was decided and served October 19, 1976, after the hearings in this case. Of course, in Schreiber, the respondent was on specific notice, even from the title of the case, that revocation of its authority was in issue.

The REXCO history reveals no admonitions, no enforcement penalties. The REXCO division had never received any notification, either formal or informal, that its mode of operations involved violations of the Interstate Commerce Act.

As the above-quoted language indicates, a finding of "willfulness" under such circumstances is contrary to Commission policy and practice.



From the Commission's Reports and Orders herein served November 19, 1976 and January 28, 1977 it is not clear precisely what the Commission relied upon in making its "willfulness" finding. The record reveals no fraudulent efforts to alter records, which would indicate both a knowledge that the activities were illegal and a willful disregard for the Commission's rules and regulations. Neither does the record reveal any prior admonitions, civil forfeitures, cease and desist orders, etc. which would put the REXCO drivers of REA bankrupt on notice that any aspects of its operation were illegal.

One or more of these three elements of prior notice have been present in every prior Commission decision in which a finding of willfulness was made. None of them is present in the REXCO situation.

A review of prior Commission decisions in which a finding of willfulness was made will amply illustrate the unprecedented nature of the action taken by the Commission in the instant case. In Querner Truck Lines, Inc. - Investigation, 100 M.C.C. 215 (1965), the Commission found the carrier to be engaged in violations of the driver qualification, hours of service, equipment safety, and leasing regulations and to be engaged in unauthorized operations. The record indicated that the carrier had falsified freight bills and had failed to comply with a prior cease and desist

order. The Commission made the following observation with respect to the willfulness finding:

"Respondent has engaged in this persistent conduct despite advice, admonitions, technical aid, formal prosecutions, and finally the considered order to cease and desist.

. . . The persistence in such violations, after notice and with knowledge discloses a disregard of the statute and an indifference to its requirements which compels the conclusion that respondent willfully violated the Commission's order to cease and desist."  
(Emphasis added)

Further, it is significant to note in Querner that, even in the face of numerous violations and persistent failure to comply with Commission orders or heed Commission admonitions, the Commission determined that a 30-day suspension of authority was a sufficient penalty. See also, Midwest Emery Freight System, Inc. - Control and Merger, 101 M.C.C. 19 (1965); Buck's Express Service, Inc. - Investigation, 115 M.C.C. 353 (1972); Allied Van Lines, Inc. - Invest. & Revoc., 121 M.C.C. 311 (1975); Midwest Emery Frt. System, Inc. - Invest. & Revoc., 124 I.C.C. 105 (1975); Georgia-Florida-Alabama Transp. Co. - Investigation, 125 M.C.C. 41 (1976). A review of each of these cases reveals that the Commission has consistently made a finding of willfulness only where there has been a failure to comply with a prior cease and desist order, where evidence of attempts to falsify records existed, or where prior formal or



informal notifications that the carrier's operations involved unlawful activities had been given to the carrier. No such finding has been or could be made on the record in the proceeding here under review.

The prior notice and knowledge upon which the Commission relied in making its willfulness finding did not exist as to the REXCO division operation of REA bankrupt. REXCO had never received any form of notification, formal or informal, which would form a basis for the conclusion that the REXCO division of REA bankrupt persisted in unlawful activities "after notice and with knowledge."

The Commission's finding of willfulness in this proceeding without (1) a prior cease and desist order, (2) civil forfeiture, (3) show cause order, (4) admonition, etc. is a departure from prior precedent without explanation or justification, which departure is, therefore, arbitrary and capricious, and unwarranted in law or in fact.

2. The ICC's Conduct And Representations  
Regarding REA's REXCO Division Operations  
Preclude "Willfulness" Opprobrium Against  
The Trustee's Continuation Of Those Operations.

The Commission's stated ground "that the Commission's statement to the Bankruptcy Court referred to above indicated that the REXCO operations were under investigation, and for the Commission to have further qualified its statement would have been improper under the circumstances", 1/ does not suffice to support its conclusion of willfulness and the use of that conclusion to revoke nationwide express authority and terminate an entire mode of transportation. The facts of the situation cannot be ignored in evaluating the "willfulness" conclusion. The Trustee was appointed by the Bankruptcy Court in November of 1975. The REXCO division operations had been conducted, following direct legal challenge before the Commission 2/ which had not even resulted in the institution of an investigation, since August of 1975. If there was the possibility that the Commission's ultimate finding of unlawfulness resulting from the investigation instituted only after formal complaints were filed, might result in the revocation of the entire express company authority on which nationwide service had been performed because of the "willful" nature of those

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1/ J.A. 841

2/ See ICC Suspension Board case No. 65240 Cf. J.A. 250



operations, we submit that the requirements of adequate notice and fair hearings contemplated in the constitutional requirement for due process mandated some indication of that possibility.

It was arbitrary and capricious for the Commission to place the Trustee in a position of peril under which the Trustee must either (1) without prior indication of the unlawfulness from the Commission discontinue an operation that had been performed by REA after legal challenge and was providing service to the public and could be conducted profitably by the Trustee, thereby possibly bringing into question the performance of his fiduciary responsibility in preserving the assets of the estate, on the one hand, and (2) on the other hand, running the risk that the Commission, without forewarning, would find that the continuation of the REXCO operations was of such a nature as to constitute a willful violation of the Act justifying total destruction of all of the authorities. The Commission has a higher duty than to play such cat and mouse games. Pertinent here, the Commission's conduct and representations relative to the continued operations of the REXCO division by the Trustee and his predecessor render it irrational, arbitrary and capricious for the Commission to find that those operations were willful violations of law.

If the operations were so totally and so patently unlawful, the Commission was derelict in its duty in not so indicating to the Bankruptcy Court. In fact, if the operations were so patently and clearly unlawful, the Commission should be judged as derelict in its duty for not pursuing the appropriate remedies contemplated under the Act 1/ and previously used by the Commission in the proper exercise of its authority, rather than letting the operations continue at the peril of the newly appointed Trustee and the bankrupt's estate. We submit that the Commission was in error in stating that "to have further qualified its statement would have been improper under the circumstances."

(Order of January 28, 1977, page 4, lines 23-24) On the contrary, the Commission was under a duty to notify the Court and/or the Trustee that there was a possibility that if the operations were found to be unlawful the continued operation in the interim would be viewed as willfulness and would be further used to revoke all authorities on which nationwide express service had been provided.

Revocation is a sanction of a punitive nature that has not been asserted against any other carrier regardless of

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1/ See 49 U.S.C. §§322(b)(1) and (2)



the nature of their violations. 1/ For the Commission to have held back from the Trustee and the Bankruptcy Court its intention, or even the possibility, that any operations found unlawful would be considered willful and the basis for revocation of all authority was arbitrary and capricious in the extreme.

The Commission's further asserted grounds "that on the contrary said statement [the Commission's statement to the Bankruptcy Court] should have put a reasonable person acting in good faith on notice of the possible unlawfulness involved in those operations. . .", 2/ improperly, arbitrarily and capriciously characterizes the inferences which may be drawn from the Commission's statement. The relevant portion of the Commission's Statement 3/ to the Bankruptcy Court reads as follows:

"First, this court should be made aware of the fact that several formal complaints have been filed with the Commission challenging the authority of the REXCO Division of REA to conduct the truckload operations and service it is presently providing under its nationwide mileage Commodity Tariff 85, copies of which are attached.1/ Since the Commission will decide the issues in the above matters, it would be inappropriate to express any opinion

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1/ See discussion infra pages 72-77.

2/ J.A. 841, lines 25-28

3/ J.A. 753

with respect to the merits of the court's order of December 8, 1975.

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1/ American Trucking Ass'ns., Inc. v. REA Express, Inc., Docket No. MC-C-8867 (Filed December 5, 1976); Brada Miller Freight System, Inc. v. REA Express, Inc., Docket No. MC-C-8862 (filed November 26, 1975); and Schneider Transport, Inc. v. REA Express, Inc., Docket No. MC-C-8864 (filed November 28, 1975). Additionally, the American Trucking Associations, Inc. filed a Petition Seeking Dismissal of REA's permanent authority application (MC-66562 (Sub-No. 2314)) for want of prosecution and for cancellation of REA's related temporary authority (MC-66562 (Sub No. 2308TA)). Also pending are protests to REXCO's Commodity Tariff No. 85 which proposes to extend the rates to include the transportation of various other commodities."

The above-quoted Statement is nothing more than a notification to the Bankruptcy Court that complaints had been filed with the Commission challenging the nature of the REXCO operations. While we agree with the Commission 1/ that it is true that the above-quoted language cannot be construed as a condonation of the REXCO operations, it is equally true that the above-quoted language cannot be construed as a condemnation of the REXCO operations. It is a pure statement of fact, nothing more. To draw any inferences from the statement itself or from the fact that it was made is improper

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1/ J.A. 841



and unwarranted. It did not put REA on notice.

The complaints to which the Commission's Statement made reference raised substantially the same issues that had been raised by the protestants who challenged REA Tariff 85. The protestants in that case did not prevail and there was no reason to believe that the complainants in the pending cases would prevail.

The Trustee's belief that the REXCO operations would successfully withstand any allegations of unlawfulness was reinforced by the fact that Donald W. Williams, Manager of REXCO, fully explained the proposed operations of the REXCO division in an Affidavit dated June 30, 1975. 1/ That affidavit clearly indicated that REXCO would utilize the services of owner-operators, would not maintain terminals, and would not provide platform services or assembly or pickup services. 2/ The Affidavit also indicated that REXCO would utilize field agents on a commission basis. 3/ No objections were raised by the Commission to the type of service outlined in the Affidavit. Since the actual REXCO operations substantially conformed to the description contained in the Affidavit, there was no reason to believe

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1/ J.A. 250

2/ Ibid

3/ Ibid

that any subsequent examination by the Commission would lead to the conclusion that the operations in question were unlawful.

In view of the fact that REXCO's operations had been examined by the Commission on prior occasions and found to be consistent with express service and its operating authority, 1/ the existence of the complaints and the Commission's neutral notification to the Bankruptcy Court of their existence could not reasonably be expected to put REXCO on notice that its operations were unlawful. The contrary inference indulged in by the Commission is unwarranted, arbitrary and capricious.

To draw an inference of knowledge to support willfulness from the fact that a complaint case was pending before the Commission is to prejudge the case on its merits prior to a full and fair hearing. Such an action is contrary to due process and the underlying presumption of the American judicial system that one is innocent until proven guilty.

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1/ See Freight, All Kinds, L.C.L. Container Charges - U.S.A. 323 I.C.C. 468 (1964); Chemicals in Aggregate Shipments - Midland, Michigan to the East, 335 I.C.C. 20 (1969); Aggregate Rates on Wearing Apparel - Railway Express Agency, 318 I.C.C. 737 (1963); Freight, All Kinds, L.C.L. Unitized Charges - U.S.A., 326 I.C.C. 594, 624 (1965); and Cf. Railway Express Agency, Inc. - Extension - Nashua, N.H., 91 M.C.C. 311, 324 (1962) and REA Express, Inc., Application for ETA, 117 M.C.C. 80, 88-89 (1971).



It is important to note that the pending cases were initiated upon complaints filed by REXCO's competitors. This was not an investigation by the Commission instituted on its own motion where it might be proper to infer that the institution of the proceeding was sufficient to "put a reasonable person acting in good faith on notice of the possible unlawfulness involved in those operations." No such inference may properly be drawn from the actual circumstances.

In its January 28, 1977 Order, 1/ the Commission also dismissed the Defendant's argument that a finding of willfulness was unwarranted due to the fact that Commission employees were aware of, and apparently acquiesced in, the REXCO operations with the following language:

"...even if it is assumed that Commission personnel made arguably favorable statements concerning the Rexco operations, it is well-settled that the Commission cannot be bound by such statements and defendant cannot reasonably rely upon them such as to negate any willful aspect of its operations involved herein [see U.S.A.C. Transport, Inc. v. United States, 235 F. Supp. 689 (1964), aff'd. per curiam, 380 U.S. 450 (1965)]. . ."

It is irrational, arbitrary and capricious for the Commission to call the Trustee's continuation of the REXCO operations "willful" in light of the Commission's own conduct and representations.

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1/ J.A. 841



3. The Record Does Not Support A  
Finding Of Willfulness As To  
Specified Violations

A review of each of the grounds on which the Commission reasserts its right to make a finding of willfulness and use that willfulness finding to support the revocation of the authorities, whether the ground is in the order of January 28, 1977 or in the Report and Order of the Commission of November 19, 1976, demonstrates that these grounds do not support the conclusion.

There is no rational connection for the willfulness finding. The reason why the willfulness finding cannot be affirmed is the use of that willfulness by the Commission as its basis for revoking nationwide express service. An entire mode of transportation will be lost to the shipping public forever.

The Commission first contends that "court approval (Bankruptcy Court) of the continuation of the REXCO operations did not insulate defendants from the involved action."<sup>1/</sup> REA does not contend that the Court approval of the continuation of the REXCO operations insulated the defendant from a complaint that the operations were unlawful and the possibility that a cease and desist order would be entered against such operations. REA does argue, however, that,

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<sup>1/</sup> J.A. 841, lines 10-11



in the context of the Court approval of a continuation of the operations which had been conducted since August of 1975 and continued after the Commission had submitted its "Statement for the Interstate Commerce Commission Concerning Order Dated December 8, 1975, Authorizing Trustee To Continue To Operate REXCO," 1/ dated December 15, 1975, that approval serves to eliminate a possibility of "willfulness" in the sense in which the Commission wishes to use such a conclusion to terminate the authority on which REA had operated.

The Commission's reliance upon NLRB v. Baldwin L. Works, 128 F. 2d 39 (1942) 2/ is totally inapposite. 3/ In arguing that the Commission cannot be bound by any statements from Commission personnel, arguably favorable, concerning the REXCO operations, again the Commission misses the point. We do not contend that the statement submitted by the general counsel could bind the Commission. Obviously it cannot. 4/ REA submits that the representation made by the General Counsel's office to the court can and must be

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1/ J.A. 753

2/ J.A. 841

3/ NLRB v. Baldwin L. Works, 128 F. 2d 39 (3rd Cir. 1942), merely established that pursuant to specific statutory authority a trustee in bankruptcy is subject to the jurisdiction of the NLRB and that a decision of the court in bankruptcy cannot relieve the debtor of the operation of the labor laws.

4/ Thompson v. Texas-Mexican R. Co., 328 U.S. 134, 146 (1946).



recognized as a factor operating to negate any willfulness in the operations of the REXCO division subsequently found to be unlawful. Southern Ry. Co. v. United States, 412 F. Supp. 1122, 1143 (D. D.C. 1976) The case cited by the Commission, U.S.A.C. Transport, Inc. v. United States, 235 F. Supp. 689 (D. Del. 1964), aff'd per curiam, 380 U.S. 450 (1965), does not justify ignoring the statement of the Commission through its General Counsel as a significant factor in totally negating any willfulness in the operation subsequently found to be unlawful, at least insofar as such willfulness could be utilized as the grounds for revocation of authority. 1/ The General Counsel's statement to the Bankruptcy Court must be looked at as something more substantial than an informal opinion of one of the Commission's employees. It was sent to the court in direct response to an inquiry from the court to the Commission. It must be given some status more than "an informal opinion" which can be totally ignored. The USAC Transport case did not involve any question as to willfulness in unlawful operations as that willfulness might have been mitigated or avoided because of the reliance upon an informal opinion at least giving a

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1/ The USAC Transport case merely involved a court affirmation of a Commission interpretation of a certificate. As relevant to this proceeding the case only stands for the proposition that the ICC is not required to accept "informal opinions expressed by one of its employees." 235 F. Supp. at 693.



color of right. In fact, the USAC Transport case shows that when the Commission is posed with a problem of interpreting the scope of an authority, after it makes the interpretation and finds that certain operations which are claimed to be permitted and which had been conducted were not encompassed within the authority, the Commission does not find that the conduct of such operations had been "willful". 1/

While it is true that the Commission will not be bound by the statements of its employees, the Commission is arbitrary and capricious when it refuses to find that reliance by the Trustee and his REXCO division attorneys on the ICC's conduct and statements negated a finding of willfulness. The term "willfully" is used to "characterize 'conduct marked by careless disregard whether or not one has the right so to act.'" United States v. Illinois Central R. Co., 303 U.S. 239 (1937). The fact that REXCO representatives sought to outline the activities of the REXCO

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1/ In the USAC Transport case the argument was made by the plaintiff, a competing motor carrier, that the defendant was transporting jet thrust units used in missiles without authority. The Hearing Examiner found that the certificate covering "aircraft" included missiles but the Division reversed the Examiner's finding and the Commission, en banc denied reconsideration of the Division Report and Order. Obviously the defendant carrier, USAC Transport, knew what it was doing and did it as a voluntary act. The fact is it was doing something that the Commission found was unlawful. The Commission did not find, however, that there was willfulness that would justify the revocation of USAC Transport's authority, temporary or permanent. No punitive sanctions appear to have been leveled against USAC.



division to Commission staff members and sought to keep the Commission fully apprised of the status of the REXCO operations and the negotiations for a transfer of operating rights 1/ certainly contradicts any assertion that the conduct of REXCO could be characterized as marked by "careless disregard" of the legality of its activities.

The only clear inference that can be drawn from the fact that the meetings were held and other communications were made is that the Trustee was very concerned that the REXCO division operations remain within the bounds of the law. The fact of the meetings between the Trustee and the Commission rather than the statements of the Commission representatives is the decisive factor. While the apparent condonation of REXCO's operations by the General Counsel and others may not be binding upon the Commission, the fact that the Trustee initiated such communications demonstrates his honest concern for the law, not a "reckless disregard" of it or, as the Commission arbitrarily found "such disregard of statutory regulation irrespective of evil intent or erroneous advice, constituting willful behavior on the part of the defendant." 2/

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1/ J.A. 744

2/ J.A. 841



Since the facts of the operation and the basis on which the competing motor carrier industry challenged the lawfulness of the operations were brought before the Commission immediately upon the filing of the REXCO tariffs and before any operations had commenced, at some point the ICC would be called upon and required to take affirmative steps to interpret and enforce any restrictions which it felt were contained in the operating authorities of REA. The combination of failure to enforce after either a brief or considerable period of time "and the sidestepping of opportunity for clarification has a bearing on the equity of reliance by the carriers [and by the Commission], and of imposing liability for the period of inaction." Southern Ry. Co. v. United States, 412 F. Supp. 1122, 1143 (D. D.C. 1976) Paraphrasing Judge Leventhal's discussion of the problems regarding possible liability for previous non-compliance in Southern Ry. Co. v. United States, 412 F. Supp. at 1143, the Commission had identified before, as a problem involving the scope of "express service", the specific method of operation of the REXCO division. But by its July 1975 and post-July 1975 inaction and unwillingness to provide clarification the Commission intimated that respondent, REA had satisfied the requirements of the statute and

the description of express service in the method of operation described for the REXCO division.

"The problem here is not one of retroactivity, strictly speaking", where there is no contention that the Commission has established a new standard of conduct through any reinterpretation of the scope of express service. "But there is an element of unfairness in exposing parties to liability when they are confused as to what is required of them and the Commission declines to resolve doubts and indeed by inaction and some affirmative conduct suggests that they are in compliance." Southern Ry. Co. v. United States, supra at 1143.

Even if it is the Commission's understanding that REA is liable for previous non-compliance with clear and unequivocal Commission regulation and applicable law as a result of the operations of the REXCO division, the Court should rule that considerations of equity bar liability for previous non-compliance prior to the issuance of the cease and desist order. Compare Southern Ry. Co. v. United States, 412 F. Supp. at 1147. Considerations of equity certainly bar a liability in the form of a punitive revocation of all of the Hub system authority equivalent



to a destruction of the entire express company operation and an entire mode. Equitable factors may bar all retro-active relief. 1/

Principles of equity should govern here, just as they should have governed to preclude the Commission finding that the unlawfulness in the REXCO division operations was of such a willful nature as to justify revocation of the entire authority and destruction of the entire assets of the estate.

"The principles of equity are not to be isolated as a special province of the Court. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law."

Niagara Mohawk Power Corp. v. FPC, 126 U.S. App. D.C. 376, 383, 379 F. 2d 153, 160 (1967), quoted in Southern Ry. Co. v. United States, 412 F. Supp. at 1151.

As emphasized by Judge Leventhal in Southern Ry. Co. v. United States in quoting the foregoing language regarding

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1/ Southern Ry. Co. v. United States, 412 F. Supp. 1122, at 1147, citing Buckley v. Valeo, 424 U.S. 1, 142, 96 S. Ct. 612, 693, 46 L. Ed. 2d 659, 758 (1976); Blair v. Freeman, 125 U.S. App. D.C. 217, 218, 370 F. 2d 229, 240 (1966), Moss v. CAB, 172 U.S. App. D.C. 198, 208-9, 521 F. 2d 298, 308-9 (1975); Zuber v. Allen, 396 U.S. 168, 197, 190 S. Ct. 314, 330, 24 L. Ed. 2d 345, 362 (1969); Consumer Federation Of America v. FPC, 169 U.S. App. D.C. 116, 128, 515 F. 2d 347, 359 cert. denied, 423 U.S. 906, 46 L. Ed. 2d 136 (1975); Indiana & Michigan Electric Co. v. FPC, 163 U.S. App. D.C. 334, 343-48, 502 F. 2d 336, 345-50 (Reh'g, 1974), cert. denied, 420 U.S. 946, 43 L. Ed. 2d 424 (1975); National Association of Independent Telephone Producers & Distributors v. FPC, 502 F. 2d 249 (2d 2 N.D. Circ. 1974).

garding the principles of equity:

"And this is particularly the case where liability for past non-compliance not only implicates a possible statutory barrier. . .but also may have impact on the present solvency of the carriers, triggering the very concerns that led Congress to establish the I.C.C." 412 F. Supp. at 1151; Compare Moss v. CAB, 172 U.S. App. D.C. 208-9, 521 F. 2d 298, 308-9 (1975).

It is not clear whether the Commission's finding that the Trustee willfully carried on unlawful operations is based (1) upon his willfully carrying on the REXCO operations under express company authorities which, in the view of the Commission, did not encompass the operations conducted or (2) whether it was based upon his negligently permitting violations of DOT regulations or route or other restrictions within that authority. This very vagueness demonstrates the weakness of the Commission's position as to willfulness.

If the willfulness of violations is based on the conduct of non "express service", it is significant, if not dispositive, to note that the Commission has still not provided a definition of "express service" capable of clear application to all circumstances.

Willfulness depends on knowledge. If a charge of willfulness in violations is to be sustained it must at



least be based on acts which violate known standards. The Commission's decision does not specify any such known standards which REA violated.

- a. Ex post facto findings of unlawful REXCO division operations do not justify a nunc pro tunc finding of willfulness to support revocation of authority.

Hindsight is often better than foresight. Here, the Commission has imposed upon the Trustee the obligation to suffer the consequences of inadequate foresight as to what the Commission might make of the operations as to their lawfulness, but, more than that, what the Commission might make in terms of willfulness of those operations as a basis for revocation of all operating authority. The Trustee submits that the Commission is attempting a notorious bootstrap operation in now asserting, as it did at page 4 of the Order of January 28, 1977,

"And that finally, there is substantial and convincing evidence of record to supporting the finding that the involved operations were totally unlawful, demonstrating, at the very least, a lack of supervision or such disregard of statutory regulation, irrespective of evil intent or erroneous advice, constituting willful behavior on the part of defendant . . ." (Order of Jan. 28, 1977, p. 4, 1. 28-34)

REA submits that analyzing the separate elements utilized by the Commission in arriving at a conclusion

that the operations were "totally unlawful" indicates that there was definitely no clear precedent on which an opinion could be rendered (1) in July of 1975 when the tariff was filed, (2) in August of 1975 when the operations of the REXCO division were begun after the Commission refused either (a) to reject the tariff covering the REXCO operations or (b) to investigate that tariff despite allegations that the operations were not express service and therefore not authorized in the REA authorities, (3) at the time the Trustee was appointed and received authorization to continue the operations of the REXCO division in November 1975, (4) at the time complaints were filed in the consolidated proceedings in late November and December 1975, or (5) at any subsequent time.

The Commission's finding of willfullness on an ex post facto basis and the utilization of that finding to destroy the REA authority is directly contrary to its own statement in the Report and Order of November 19, 1976, 1/ recognizing the difficulty of clearly identifying precisely what a lawful express service is:

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1/ J.A. 709



"Although we have said that 'express service' is not susceptible of precise definition, we repeatedly have set forth guidelines that have established the basic indicia of that term. Here, we need not consider whether an operating express company, holding authority limited by these terms, could never stray outside the general definition set forth in the ETA, Nashua, and Arrowhead cases, supra. We do not deny that there could be situations (such as the handling of consolidated truckloads), where a service would not meet one of the general criteria of express service but would at least satisfy several of these requirements. Also, we need not consider if an operating express company, whose overall transportation activities predominantly satisfy the definitions of express service, can conduct operations not within the strict concept of express service but nevertheless incidental to express service. Compare the decision in Chemicals in Aggregate Shipments, supra." (Report and Order of November 19, 1976, p. 18, l. 16-30, Index No. 125)

The foregoing quoted statement by the Commission indicates the lack of precise definition in describing the authorized "express service." It recognizes that there are possible situations where the express company could "stray outside the general definition" and "where a service would not meet one of the general criteria of express service but would at least satisfy several of these requirements." The foregoing definition also recognizes that if the express company was operating its

overall transportation activities it might also "conduct operations not within the strict concept of express service but nevertheless incidental to express service."

Never before has there been any indication from the Commission that the scope of a certificate is altered by the fact that all of the service possible or potential under the certificate was not simultaneously being provided. There is no indication, for example in any decisions that a general commodity carrier cannot handle the transportation of some commodities unless it is at the same time truly transporting all general commodities. Nor is there any indication that a carrier cannot continue to provide service over portions of its authority where there is traffic being offered unless it is at the same time providing service over all such routes and authorities. Yet this is the standard that the Commission will impose ex post facto on the Trustee. The Trustee is held responsible for continuing a portion of the operation which had been operated previously and which definitely meets a number of the criteria or requirements of express service because the Trustee was unable to operate the entire "overall transportation activities" of the express service.

The Commission's distinction between the lawfulness of the REXCO division operations when they might be viewed



as incidental to the historic, overall express service prior to November 1975 and the lawfulness of the REXCO division operations after the historic, overall express service terminated, is without rational foundation in fact or law, and is arbitrary and capricious.

b. The Recitations Of REA Actions And Non-Actions  
Do Not Rationally Support A Finding Of Willfulness

The Commission's varied recitations of specific actions or non-actions by REA, particularly REA's REXCO division, are inadequate to sustain the finding of willfulness on several grounds: (A) These actions or non-actions were neither alleged nor specified as violations in issue herein either in the complaints or the Bureau of Enforcement's specification of charges; (B) The actions or non-actions are not violations of either law or regulation and are, therefore, irrelevant to alleged willfulness; (C) There are no established norms or criteria to determine if there is or is not compliance, much less whether or not non-compliance is willful; (D) These actions or non-actions are irrelevant to defined or specified criteria of "express service"; and (E) The record does not support the finding of the action or non-action by the REXCO division: the asserted negative is not proven, there is evidence of affirmative action to the contrary.

To simplify petitioner's argument showing the erroneous, arbitrary and capricious nature of the Commission's conclusion of willfulness and the varied nature of the recitations in



alleged support of that conclusion, we number and repeat in Appendix B each of the Commission's recitations and then indicate the basis of our challenge by the letters A, B, C, D or E signifying the ground of inadequacy listed above. Further details of the form of the inadequacy, and hence arbitrary and capricious nature of the recitation as support for the willfulness conclusion are given where needed or appropriate.

4. The Sanction Against REA, The Revocation Of REA's Basic Nationwide Authority, Is Unwarranted In Law And Without Justification In Fact, And Is Arbitrary And Capricious

In this proceeding a sanction which is punitive rather than remedial in nature has been used. REA has a longer history than any motor carrier subject to the regulations of the Interstate Commerce Commission. REA has provided nationwide service under the authorities which would be revoked under the sanction here in issue. Revocation of authority of a carrier is the ultimate sanction. Revocation of a carrier's entire authority has not, to our knowledge, ever been invoked previously by the Commission with respect to any carrier that had any significant operations. The authority being revoked under the punitive action of the Commission forms the basis upon which nationwide express service had been performed since 1968 on tens of millions of shipments for millions of shippers.



The purpose of a remedial statute should be to correct any deficiencies found in the service relative to compliance with restrictions in authorities, routes to be used, regularity of service, restriction of service to only authorized points via authorized regular routes, etc.

It is fundamental, of course, that the Commission's disciplinary powers with respect to proceedings involving carrier misconduct are remedial rather than punitive in nature. Querner Truck Lines, Inc. - Investigation, 100 M.C.C. 215, 220 (1965); Kim Freight Lines, Inc. - Investigation, 86 M.C.C. 593, 599 (1961). The Commission, as it must, recognizes this concept and attempts to insure that the remedy chosen by it is commensurate with and properly related to the misconduct involved. In Midwest Emery Freight System, Inc. - Investigation and Revocation, 124 M.C.C. 105 (1975), for example, the Commission stated in this regard, at page 117:

"In numerous proceedings we have held that the purposes of sections 212(a) of the act are not punitive. Thus, our power to act thereunder must not be used to punish an offender for his misdeeds, but rather to assure that he will not repeat them."

In Gilbertville Trucking Co. v. United States, 271 U.S. 115, 129-130 (1962), the Supreme Court addressed the



issue of the appropriate remedy for an unlawful acquisition of control in violation of §5(4) of the Interstate Commerce Act. The Court noted that the Commission's power under §5(7) "is corrective, not punitive." The Court recognized that its "duty is to give 'complete and efficacious effect to the prohibitions of the statutes' with as little injury as possible to the interests of private parties or the general public." (Emphasis supplied)

The principles and obligations outlined in Gilbertville have been extended beyond the §5(7) context in which they were first applied and have been recognized as controlling in cases arising under §212(a) where there is a possible revocation of authority. See, Allied Van Lines, Inc. - Invest. and Revoc., 121 M.C.C. 311, 315-316 (1975); Midwest Emery Frt. System, Inc. - Invest. & Revoc., 124 M.C.C. 105, 115 (1975); Georgia-Florida-Alabama Transp. Co. - Investigation, 125 M.C.C. 41, 47 (1976).

The Commission's obligation is to shape a remedy which is sufficient to deter future violations of the Act without unduly injuring the interests of the public or of the private parties involved. Obviously, past performance on the part of the carrier is an important element to be considered. A less stringent penalty than revocation of



authority and destruction of an entire mode of transportation is warranted and, indeed should be mandated by this Court, where, as here, (1) there is no evidence to indicate failure to comply with prior Commission orders, (2) there has been no prior notice of claimed violations, (3) the party charged has had no opportunity to comply, or (4) the violations are unwitting. An extensive review of decisions of the Commission indicate that the Gilbertville approach has been consistently applied by the Commission, with the exception of the instant case.

There is nothing in the Commission's orders of November 19, 1976 and January 28, 1977 to indicate that the choice of remedy was based upon a balancing of the interests of the public and of the private parties. The vast amount of shipper support in the pending application proceeding indicates a large demand for express service of the nature provided only by REA Express. This fact apparently was ignored by the Commission when it determined that REA's temporary authority should be revoked and its permanent application dismissed, thus destroying the basis upon which REA had provided express service for many years. Further, there is no indication in the Commission's reports that it considered the viability of a less harsh remedy. There was no finding



and no basis for finding, that a cease and desist order would have been insufficient to compel compliance.

Revocation of extensive authority of the scope and magnitude of REA's authority has not been used as a sanction by the Commission for violations of the Act or its regulations. Querner Truck Lines, Inc. - Investigation, 100 M.C.C.

215 (1965) (suspension of 30 days, rather than examiner's recommended permanent cessation, for willful failure to comply with prior cease and desist order and motor carrier safety regulations); Kim Freight Lines, Inc. - Investigation, 86 M.C.C. 593, 599 (1961) (cease and desist only rather than 10 day suspension recommended by examiner for unlawful transportation, some of which was willful.); Midwest Emery Freight System, Inc. - Investigation and Revocation, 124 M.C.C. 105, 114, 119 (1975) (suspension for 180 days only of privileges to engage in trip leasing and to interline or interchange traffic with other motor carriers after flagrant violations of two outstanding cease and desist orders, falsification of records, and long history of violations after repeated warnings; the Commission declined to revoke any authorities although urged to do so by the Bureau of Enforcement); Federal Highway Administration v. Safeway Trails, Inc., 113 M.C.C. 815, 826 (1971) (suspension



for only 30 days of only charter operations where there were 5,315 violations in 16 months and there was continuous persistence in noncompliance notwithstanding prior proceedings, warnings, admonitions, and the entry of a cease and desist order together with past misrepresentations)

Lane-Revocation of Permit, 52 M.C.C. 427, 434-5 (1951)

(60 days within which to comply with insurance regulations or suffer revocation after 7 years of non-compliance and 11 years without operations); MC-C-7874, United Van Lines, Inc. - Investigation and Revocation of Certificates, 125

M.C.C. 86, 95 (1975), aff'd 545 F. 2d 613 (8th Cir. 1976)

(suspension of only part of authority, for only 30 days after "the continuous pattern of rules violations, in the face of the carrier's prior civil forfeiture record.");

North American Van Lines, Inc. - Investigation and Revocation of Certificates, 121 M.C.C. 126 (1975). The Commission

clearly failed to adhere to its prior policies governing the invocation of sanctions. Such a departure from prior policies and practices is defensible only if it is adequately explained.

Atchison, T. & S.F. R. Co. v. Wichita Bd. of Trade, supra. No such explanation can be found in either the November 19, 1976 or January 28, 1977 reports. The Commission's action in this regard is clearly arbitrary and capricious, an abuse of its discretion and cannot be permitted to stand.



D. The Commission's Procedures In Dismissing REA's  
Permanent Authority Application And Revoking Its  
Temporary Authority Violate Due Process  
And The Administrative Procedure Act.

In addition to the substantive errors of the Commission's decision, previously set forth, substantial procedural deficiencies require this court to vacate and remand the decision.

This proceeding has been handled in a unique fashion which is grossly unfair to the Trustee and to the shipping public which relies upon the total express services of REA and looks for the revival of such services by the prospective successor, Alltrans Express U.S.A., Inc.

REA submits that the procedures followed in dismissing REA's permanent authority application and revoking its temporary authority violate due process and the Administrative Procedure Act.

The Commission erred in finding:

"That the defendant has been afforded appropriate due process. . ."  
(p. 22)

In having its permanent "Hub" application dismissed, its related temporary authority in Sub 2308TA revoked, its operation of the REXCO division found to be totally illegal



and in the nature of a willful violation, defendant, REA Express, Inc., Bankruptcy, C. Orvis Sowerwine, Trustee in Bankruptcy, has been denied due process as follows:

1. REA was not provided any prior notice of the specific violations alleged or found to exist.
2. REA had no notice that fitness and ability as to pursuit of the permanent application was in issue, the presiding Administrative Law Judge having ruled that such elements were not in issue. 1/
3. REA had no notice that issues as to public convenience and necessity or that related issues of immediate and urgent need for temporary authority were in issue and to be decided, the presiding Administrative Law Judge having ruled that such elements were not in issue. 2/
4. REA had no notice that issues as to its ability, on its own, or through Alltrans as its proposed purchaser, to prosecute the outstanding application and to prove the feasibility and need were to be decided in this proceeding.
5. REA had no notice that the Commission would rely on the theory of law that its application for temporary authority in 1971 "repudiated" the previously filed application for Hub authority.

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1/ J.A. 355

2/ Ibid.



6. Not having had any notice that any of these issues were to be decided, REA was never afforded an opportunity to be heard through the presentation of evidence directed to such questions. REA's petition for reconsideration raised these issues and the petition was denied without opportunity for REA to present the evidence to be heard.

The Commission's reference to the failure of REA's general manager to testify concerning these matters is a self-indictment of the inadequacy of the notice; the failure of a party to address itself to crucial issues in the litigation evidences an absence of the proper notice mandated by the due process clause and the §554(b) of the Administrative Procedure Act. See ITT Continental Baking Company, Inc. v. Federal Trade Commission, 532 F. 2d 207, 215-216 (2d Cir. 1976); Navajo Freight Lines, Inc. - Investigation of Control - Garrett Freightlines Inc., 124 M.C.C. 345, 364 (1976).

REA's opportunity to be heard was also emasculated by the Commission's concoction of and reliance upon the theory that the 1971 application for temporary authority "repudiated" REA's prior application for Hub authority. The Commission cannot circumvent the deficiency of evidence in the record by developing a new basis for its



decision without affording REA notice and the opportunity to address the issue.

Finally, the Commission's decision to dismiss the application for permanent authority without proper notice to REA is improper. The decision of the Commission was based upon a theory never discussed by complainants' counsel or presented during the hearing. Therefore, it violates the due process clause and the Administrative Procedure Act, 5 U.S.C. §554(b), and must be vacated and remanded. Rodale Press, Inc. v. Federal Trade Commission, 407 F. 2d 1252 (D.C. Cir. 1968); Bendix Corporation v. Federal Trade Commission, 405 F. 2d 534 (6th Cir. 1971).



1. REA's Authority Is A Property Right Not  
Subject To Deprivation Or Revocation  
Without Due Process And Conformity To  
The Notice And Compliance Provisions  
Of The Administrative Procedure Act.

The Commission has erroneously asserted at page 5 of its January 28, 1977 Order 1/ that the "Hub system" temporary authority and any other temporary authorities held by REA can be summarily revoked on the ground that such an authority is not subject to the notice and compliance provisions of 5 U.S.C. §558 of the Administrative Procedure Act. The Commission apparently feels that such authority is not protected as a property right by the due process guarantees of the Constitution. On the contrary, the temporary authority held by REA is a property right entitled to protection under the Constitution and entitled to the procedural protection of the Administrative Procedure Act, 5 U.S.C. §558.

The authority held by REA and that by which it provided nationwide service on tens of millions of shipments for millions of shippers in over the road service since 1968 is a property right constitutionally protected against deprivation or revocation without due process. The Supreme Court has made it clear in Pan-Atlantic S.S. Corp. v. Atlantic Coast Line R.R. Co., 353 U.S. 436, 1 L. Ed. 2d

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1/ J.A 838



963, 77 S. Ct. 999 (1957), that:

"A temporary authority granted under Section 311(a) of the Interstate Commerce Act would seem to be a 'permit' or 'certificate' under the Administrative Procedure Act. 'Licensee', as used in the sentence of §9(b) which we have quoted, would seem, therefore, to include one who holds a temporary permit under Section 311(a). It is argued that 'license' in that section includes only those that are permanent. But we see no justification for that narrow reading. A permit for 180 days conveys an 'activity of continuing nature.'" 353 U.S. at 438-439.

The Supreme Court in Pan-Atlantic in interpreting the scope of the term license was referring to the language in Section 9 of the Administrative Procedure Act, 5 U.S.C. §558, which immediately follows, and the stated limitations on the ability of an agency to withdraw, suspend, revoke or annul a license:

"Except in those cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefore, the licensee has been given -

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements."



Pan-Atlantic was interpreting the scope of Section 311(a) of the Interstate Commerce Act, 49 U.S.C. §911(a). Section 311(a) of the Act, dealing with temporary operations for water carriers or contract carriers by water is identical in language to the provisions of Section 210a, 49 U.S.C. §310a, establishing the statutory authority for the grant of temporary authorities to common carriers or contract carriers by motor vehicle under Part II of the Interstate Commerce Act. REA's temporary authority is a protected property right. Blackwell College of Business v. Attorney General, 454 F. 2d 928 (D.C. Cir. 1971) recognized that a school's inclusion on an Immigration and Naturalization Service "approved" list for attendance of nonimmigrant aliens was "a valuable asset in the nature of a license" so it was protected by both the Administrative Procedure Act and more general concepts of administrative due process against arbitrary revocation "in formless - and essentially ex parte. . . proceedings." Id at 934-35. We submit that if a business college's place on an Immigration Service "approved" list is subject to these protections, REA's authority on which nationwide express service was rendered on tens of millions of shipments for millions of customers during a period of over seven years from June 1968 to



November 1975 is entitled to the same protections. Similarly, in New York Pathological and X-Ray Laboratories Inc. v. Immigration and Naturalization Service, 523 F. 2d 79, 82 (2d Cir. 1975) the court held that the denial of the opportunity to provide medical examination for aliens seeking permanent residence status without notice and opportunity to be heard was in violation of the Administrative Procedure Act. Furthermore, the court also indicated that there might have been a constitutional violation of the plaintiff's right to due process. Id., p. 82-83 n. 8.

The Commission's reliance in the Order of January 28, 1977 on Great Lakes Airlines, Inc. v. CAB, 294 F. 2d 217 (1961), cert. denied, 366 U.S. 965 (1961) for the proposition that the notice and compliance provisions of Section 558 do not apply to revocation of temporary authorities is misplaced. 1/ The decision in the Great Lakes case is distinguishable on several grounds starting with the fact that the case involves the interpretation by an appellate court, not the Supreme Court, of the statute of another agency, the CAB, not the ICC. Second, the issue before the Court on review was the validity of the CAB Order which, after the completion of the entire licensing proceeding and after

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1/ J.A. 842

full hearing and full opportunity to support the applications for permanent licenses, the Board had denied based on finding applicants unqualified for permanent licenses because they lacked compliance disposition. As a result their temporary licenses thereupon expired. In response to the applicant's argument, the Court said that applicants had been operating under those temporary authorities since 1938 "at the sufferance of the Board" and there was never any guarantee that all or any of the carriers would be found qualified to perform the service or even that this type of service would be authorized at all.

Third, Great Lakes was reviewing a decision rendered after the full hearings had been completed in contrast to the instant proceeding where the I.C.C. has dismissed the permanent application and has revoked the temporary authority prior to any hearings on the merits in connection with the application for permanent authority. In that regard, with the completion of the CAB proceeding and the denial of the permanent application, the CAB temporary authority thereupon expired as a matter of law. 294 F. 2d at 223. Therefore, Great Lakes did not directly involve a question of the revocation of a temporary license or temporary authority ever of the CAB. While the discussion in Great Lakes of the



intent of Section 9(b) of the Administrative Procedure Act in light of the legislative history 1/ is interesting, it is certainly not controlling in the face of the statements of the Supreme Court entered in Pan-Atlantic.

In addition, we contend that REA's license in the nature of a temporary authority is far more than an average temporary license. That authority permitted REA to continue in over-the-road service, a service that had "grandfather" privileges for "express service" which had been authorized to be conducted without specific named certificates, permits, licenses, or authorities under Part I of the Act through the use of railroads on intercity service plus extensive express company terminal areas. That authority permitted the continued operation of the express company when rail service was discontinued by the express company's owners who were also competitors.

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1/ In Great Lakes Judge Prettyman asserts that both the Senate and House Report contain express statements to the effect that Section 9(b) was not intended to apply to temporary licenses, relying upon a letter appended to the Senate Report from the Attorney General to the Chairman of the Senate Judiciary Committee containing the following commentary on S-7, the bill that developed into the Administrative Procedure Act: "The second sentence of Sub-Section (b) [of Section 9] is not intended to apply to temporary licenses which may be issued pending the determination of applications for licenses." Judge Prettyman quoted to the same effect the Attorney General's Manual on the Administrative Procedure Act at page 91 where it is stated: "Such permits or licenses may be revoked without 'another chance' and regardless of whether there is willfulness or whether the public health, interest or safety is involved."



We would note that Great Lakes, although it was decided in 1961, does not cite or discuss the Supreme Court's contrary interpretation of the nature of a temporary authority in the Pan-Atlantic case. Great Lakes has served as limited judicial precedent. 1/

Pan-Atlantic S.S. Corp. v. Atlantic Coastline R. Co., 353 U.S. 436, 438-9 (1961), where the Supreme Court stated that temporary authority would seem to be a permit or certificate under the Administrative Procedure Act, has been extensively cited with approval. It was recently cited by the I.C.C. itself, with approval in Carolina Cartage Company, Inc., Extension - Atlanta and Charlotte Airports, 125 M.C.C. 49, 54, 56 (1976) for the proposition that a temporary

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1/ Capitol Airways, Inc. v. CAB, 292 F. 2d 755 (D.C. Cir. 1961) (affirming CAB regulations replacing the basic military exemption provision with a procedure granting individual exemptions, the court pointed out that what was involved was not a license but a definition of the exemption); Air Line Pilots Association, International v. CAB, 360 F. 2d 836, (D.C. Cir. 1966) (Great Lakes cited for the proposition that past violations serve only as the basis for an inference as to the future conduct of the carrier and the nature of the violations as well as the surrounding circumstances are relevant in appraising the likelihood of future compliance. Such a proposition does not support the revocation here imposed by the Commission but, in fact, supports the position being taken by the Trustee.); Pan-American World Airways Inc. v. CAB, 380 F. 2d 770, 772, U.S. App. D.C. (1967) (D.C. Cir. 1967) (Great Lakes cited for the history of the development of the "non-scheduled or "large irregular" air carriers.)



authority will expire when the permanent application has been finally decided, either granted or denied. 1/ In Bankers Life & Casualty Co. v. Calloway, 530 F. 2d 625, 634-5 (5th Cir., 1976), the Court held the license had expired and, therefore, 558(c) was not applicable nor did §558(c) establish a right to hearing re: application of regulations. The 5th Circuit, referring to Section 558(c), stated:

"A paraphrase of the provision taken as a whole might read 'before an agency can institute proceedings to withdraw, revoke, etc., an existing license, it must provide the licensee with notice in writing of the offending conduct and a hearing at which the licensee can refute the charges.'"

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1/ It is to be noted that in Carolina Cartage Co. the Commission had in issue the fitness of the applicant and specifically found that "applicant's many violations after that notice [the Commission's notice which informed the applicant that its temporary authority had expired], therefore, were neither justifiable nor excusable." 125 M.C.C. at 56. The Commission in Carolina Cartage actually granted authority to the applicant stating, immediately after pointing out that the many violations were neither justifiable nor excusable:

"On the other hand, considering all the circumstances herein, we believe that applicant is willing and able to comport in the future with the statute and the applicable rules and regulations, and conclude that applicant's violations do not require a finding of unfitness. Although applicant has engaged in unauthorized operations, such activities do not necessarily constitute a bar to a grant of authority to perform a needed service. See Thompson Contract Carrier Application, 72 M.C.C. 179, 181 (1957)." 125 M.C.C. at 56.

In County of Sullivan, N.Y. v. CAB, 436 F. 2d 1096, 1099 (2nd Cir. 1971) Judge Friendly cited Pan-Atlantic on the applicability of Section 9(b) of the APA as it protects against suspension or revocation unless written notice of the objectionable conduct is given to the licensee and the licensee is afforded an opportunity to comply with all lawful requirements. The Decision also recognizes the "valuable rights" conferred by a license, if only for a limited term.

Pan-Atlantic is cited for the proposition that the Commission under Section 558(c) of the APA can extend a temporary authority until such time as the application for permanent authority has been finally determined. 1/

Pan-Atlantic has also been cited for the proposition that the grant of temporary authority is within the discretionary power of the Commission and that the Court has no power to issue such a temporary authority. 2/

The Supreme Court itself has, on at least three occasions, cited Pan-Atlantic. In American Farm Lines v.

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1/ Land-Air Delivery, Inc. v. United States, 371 F. Supp. 217, 219 (D. Kans., 1973), Navajo Freight Lines, Inc. v. United States, 320 F. Supp. 318, 320 (D. N.J., 1970)

2/ Great Western Packers Express, Inc. v. United States, 246 F. Supp. 151, 155 (D. Col., 1965); Robbins v. United States, 204 F. Supp. 78, 83 (E.D. Pa. 1962)



Black Ball Freight, 397 U.S. 532, 535 (1970) it was cited for the basic proposition that the I.C.C. may extend a temporary authority. It was similarly relied upon in Burlington Truck Lines v. United States, 371 U.S. 156, 171 (1962). In Federal Land Bank v. Board of County Commissioners, 368 U.S. 146, 154 (1961) Pan-Atlantic was cited for the Court's current support of the definition of a license in Gibbons v. Ogden, 9 Wheat 1, 213, 214, 6 L.Ed. 23, 74 (1824).

The authority held by REA is in the nature of a property right entitled to protection under the constitution against deprivation without due process. See Alaska Airlines, Inc. v. CAB, 545 F. 2d 194, 199 (D.C. Cir., 1976) citing Bell v. Burson, 402 U.S. 535, 539, 29 L. Ed. 2d 90 (1971), Board of Regents v. Roth, 408 U.S. 564, 571, 577, 33 L. Ed. 2d 548 (1972). Clearly, REA has a "claim of entitlement" to the right to operate under the temporary authority which necessarily permitted it to continue operations in lieu of discontinued rail service.

2. REA Did Not Have Notice That  
Revocation Of Its Authority For  
Nationwide Express Service Was in Issue

Revocation of REA's authorities, temporary or permanent, was not a relief requested in any of the consolidated complaints. 1/ They sought a cease and desist order. The posthearing brief of the complainants conceded that "Complainants admittedly did not spell out this relief [revocation] in their complaints. 2/ Revocation, other than as incidental to the dismissal of the corresponding permanent authority, was not requested in the ATA petition. 3/ The Commission's Orders did not indicate that an unrequested relief would be possible revocation. 4/ REA was not on notice that revocation was in issue.

The statement of August 23, 1976 provided by the Bureau of Enforcement mentioned neither proof of willfulness nor the sanction of revocation. 5/ The Bureau's witness sought neither. 6/

Adequate notice of the possible revocation of its authorities, as being a possible outcome of these proceedings, was not provided by the condition contained in REA's, as in

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1/ J.A. 1, 843, 854, 865  
2/ J.A. 674  
3/ J.A. 963  
4/ J.A. 47, 49, 77, 98, 99, 100, 106, 316, 321, 322  
5/ J.A. 485  
6/ J.A. 498



as in all carriers', temporary authorities. 1/ A similar condition, as quoted by complainants in their brief, 2/ is found in REA's, as in all carriers', permanent authorities. Such standard conditions do not constitute adequate notice as required by the APA and the concept of due process.

It was only when their Briefs were filed that the complaining motor carriers and their industry association, seeking to eliminate a troublesome competitor, were emboldened to urge revocation of "all outstanding temporary authorities held by REA." 3/ Recognizing that there had been no notice of this proposed revocation since "Complainants admittedly did not spell out this relief in their complaints", but overwhelmed by anticompetitive zeal, the motor carriers argued that the Commission "should summarily on its own motion, revoke all outstanding temporary authorities."

(Exphasis supplied) 4/

Unfortunately, the Commission was only too willing to follow the importuning of the motor carriers, even to the

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1/ Sub 2308 Index 1

2/ J.A. 673

3/ J.A. 673

4/ J.A. 674

point of swallowing and regurgitating whole the motor carriers' rationalization of the APA, even to the misbegotten reliance on Great Lakes Airlines, Inc. v. CAB, 294 F. 2d 217 (1961), cert. denied 366 U.S. 965 (1961), while ignoring the contrary recognition by the Supreme Court 1/ of the rights of temporary authorities to receive the protections of 558(c) of the APA. The Commission may have been partially motivated by a desire to rid itself of a complex application, the largest ever filed, 2/ and a carrier comprising an entire mode which had presented competitive problems to the motor carriers and, collaterally, to the Commission in numerous cases. 3/

The Commission's Bureau of Enforcement when providing the required notice to the defendant, REA, in the four complaint proceedings as to "the matters of fact and law to be

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1/ Pan-Atlantic S.S. Corp. v. Atlantic Coast Line R.R. Co., 353 U.S. 436 (1957)

2/ J.A. 715

3/ See e.g., Freight, All Kinds, L.C.L., Container Charges - U.S.A., 323 I.C.C. 468 (1964); Chemicals in Aggregate Shipments - Midland, Michigan to the East, 335 I.C.C. 20 (1969); Aggregate Rates on Wearing Apparel - Railway Express Agency, 318 I.C.C. 737 (1963); Freight, All Kinds, L.C.L. Unitized Charges - U.S.A., 326 I.C.C. 594, 624 (1965); and Cf. Railway Express Agency, Inc. - Extension - Nashua, N.H., 91 M.C.C. 311, 324 (1962) and REA Express, Inc., Application for ETA, 117 M.C.C. 80, 88-89 (1971).



presented and asserted" therein by the Bureau of Enforcement 1/ made no mention of proof or allegations of either "willfulness" or "revocation." The Bureau's position was summarized in the assertion only that:

"Having presented the above-described evidence, the Bureau of Enforcement will maintain that the transportation performed by the REXCO division of REA Express, Inc. is operationally inconsistent with the concept of express service as it has been defined by the Interstate Commerce Commission." 2/

The Bureau of Enforcement's Posthearing Brief 3/ sought only a cease and desist order against the REXCO division operations. The Bureau did not reply to REA's Petition for Reconsideration, 4/ apparently satisfied with the fact that the REXCO operations had been terminated and apparently having no continuing interest with respect to the willfulness finding, the dismissal of the permanent Hub application and the revocation of the corresponding temporary authority.

REA had a statutory right to notice before its authority could be revoked. 5/ REA was not given notice that either revocation of its authority was in issue or was a sanction,

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1/ J.A. 485

2/ J.A. 487

3/ Index 117

4/ J.A. 744

5/ Eagle Motor Lines, Inc. v. ICC, 545 F. 2d 1015, (5th Cir., Jan. 24, 1977)

contemplated or proposed, if it was found that the operations of the REXCO division were unlawful or that they were willful violations.

3. REA Was Provided Neither Notice Nor The  
Opportunity To Be Heard Regarding Issues  
Of Its Fitness And Ability To Prosecute  
The Permanent Application And Issues Of  
Public Convenience And Necessity

The absence of allegations in the complaints 1/ and the specifications of charges by the Bureau of Enforcement, 2/ the absence of any notice in the Commission's procedural orders, the presence of specific rulings 3/ by the Administrative Law Judge that the consolidated proceeding did not involve issues such as public convenience and necessity or the applicant's general ability and fitness, which issues go to the merits of the Hub system application, all establish that REA was provided neither notice nor the opportunity to be heard regarding such issues. Therefore, the Commission has been arbitrary and capricious and has acted contrary to law in making findings on such issues.

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1/ J.A. 1, 843,854,865

2/ J.A. 485

3/ J.A. 355



CONCLUSION

The Commission's Report and Orders have been shown to be arbitrary and capricious, lacking in rational explanation for conclusions reached and deviations from prior precedents, unwarranted in law or in fact, and reached in violation of administrative due process and the notice and compliance provisions of the Administrative Procedure Act, insofar as the Report and Orders (1) find that the past REXCO division operations have been in the nature of willful violations, (2) dismiss the Hub system permanent application, and (3) revoke the Hub system temporary authority. The total operations of an entire mode of transportation, express service, as rendered by petitioner, REA Express, Inc., its predecessors and successors, would be arbitrarily and capriciously destroyed contrary to the public interest, the needs of the shipping public, and the mandate of the National Transportation Policy unless the Commission's Report and Orders are reversed, enjoined, annulled and set aside.

WHEREFORE, Petitioner, REA Express, Inc., C. Orvis Sowerwine, Trustee in Bankruptcy, prays that this Court

reverse, enjoin, annul and set aside the Commission's Report and Orders insofar as the Report and Orders (1) find that the past REXCO division operations have been in the nature of willful violations, (2) dismiss the Hub system permanent application, and (3) revoke the Hub system temporary authority, or, alternatively, that the Report and Orders be reversed and remanded to the Commission with instructions consistent with the Court's opinion.

Respectfully submitted,

REA EXPRESS, INC., BANKRUPT,  
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Dated: February 25, 1977



Certificate Of Service

I hereby certify that I have served the foregoing Brief of Petitioner upon all parties of record to this proceeding by mailing a copy thereof by first class mail, postage prepaid, to the following:

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REA EXPRESS, INC., BANKRUPT,  
C. ORVIS SOWERWINE, TRUSTEE IN BANKRUPTCY  
EMBARGO NOTICE

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REXCO, A DIVISION OF REA EXPRESS, INC., BANKRUPT,  
C. ORVIS SOWERWINE, TRUSTEE IN BANKRUPTCY

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C. Orvis Sowerwine, Trustee in Bankruptcy of REA Express, Inc., hereby issues this notice of embargo applicable to the operations of the REXCO division effective as of 12:01 a.m. Thursday, November 25, 1976.

Scope of Embargo: All commodities and all classes of traffic to or from all territories and points over all routes.

Duration of Embargo: Indefinite, subject to notice of termination or modification of this embargo to be issued as soon as practicable following the entry of any stay order by either the Interstate Commerce Commission or federal courts either staying, enjoining, annulling or setting aside, in whole or in part, the Order of the Interstate Commerce Commission in Docket MC-C-8862 et. al., dated November 17, served November 19, 1976.

Cause of Embargo: This embargo is issued solely because of the compelling circumstances not within the control of the carrier resulting from the entry of an order of the Interstate Commerce Commission dated November 17, served November 19 and received by the Trustee on November 22, 1976 ordering the



2.

defendant, REA Express, Inc., Bankrupt, C. Orvis Sowerwine, Trustee in Bankruptcy, to cease and desist forthwith, and thereafter to refrain and abstain from all operations conducted by the REXCO division in what the Interstate Commerce Commission order (subject to petitions for reconsideration and judicial review) found to be non-express movements through the use of commission agents and trip-lease equipment. This embargo will be lifted or modified upon modification, stay, vacation, injunction, annulment or setting aside of the order of the Interstate Commerce Commission, in whole or in part, to the extent that resumed operations would be permitted.

Don Williams  
General Manager  
By authority of  
C. Orvis Sowerwine,  
Trustee in Bankruptcy

Dated: November 24, 1976

APPENDIX B  
(Page 1 of 4 pages)

I.C.C. Recitations:  
Order of November 19,  
1976, Pages 18-19

Ground For Inadequacy  
Of ICC's Recitation To  
Prove Willfulness

	<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>	<u>E</u>
1. REXCO's general manager does not direct, control, or bear responsibility for REA's operations.	A	B	C	D	E <sup>1/</sup>
2. There is nothing on this record to indicate that there is anyone capable of knowledgeable and responsible management of the purported motor carrier operations under REA's authority.	A		C	D	E <sup>1/</sup>
3. No one in the management of REXCO is familiar with the overall scope or limitation of REA's operating authority.	A		C	D	E <sup>1/</sup>
4. No attempt is made to see that service is performed to and from authorized points (with the exception of some points west of Denver).					E <sup>2/</sup>
5. No attempt is made to see that drivers traverse authorized regular routes or to instruct them to use such routes.					E <sup>3/</sup>
6. No responsibility is taken for control of drivers or shipments after pickup.	A	B	C	D	E <sup>4/</sup>
7. No attempt is made to insure the expeditious movement of any shipment.		B	C		E <sup>5/</sup>
8. No attempt, other than completion of paperwork, is made to insure:					
a. the required inspection of trip-lease vehicles.	A			D	E
b. the proper filling-out of drivers logs.	A			D	E
c. or the attendant proper observation of the Department of Transportation hours of service limitations.	A			D	E



I.C.C. Recitations:  
Order of November 19,  
1976, Pages 18-19

APPENDIX B  
(Page 2 of 4 pages)

Ground For Inadequacy  
Of ICC's Recitation To  
Prove Willfulness

	<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>	<u>E</u>
9. No attempt is made to insure that only commodities covered by its tariffs are transported.	A			D	E
10. No attempt is made to transport less-than-truckload or small package shipments.		B	C	D	E
11. No attempt is made to use only ordinary van equipment.		B	C	D	E <sup>6/</sup>
12. No attempt is made to see that proper express receipts or other tariff requirements are followed.	A	B	C		E <sup>7/</sup>
13. No. attempt is made to be knowledgeable:					
a. of leasing. . . regulations.	A		C	D	E
b. of other [unspecified] regulations that would tend to be applicable to its method of operation.	A		C	D	E
14. REXCO operations are not performed pursuant to any established schedule (a few movements have occurred on a regular basis).			C		E
15. The operations are not conducted over regular routes.		B	C		E
16. They do not move through or between terminals.	A	B	C	D	E
17. They do not move at premium rates.					
18. They do not move in an expeditious manner.		B	C		E <sup>5/</sup>

I.C.C. Recitations:  
Order of November 19,  
1976, Pages 18-19

APPENDIX B  
(Page 3 of 4 pages)

Ground For Inadequacy  
Of ICC's Recitation To  
Prove Willfulness

	<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>	<u>E</u>
19. They often do not move in ordinary van equipment.		B	C	D	E <sup>6/</sup>
20. They exclude the transportation of small parcels and less-than-truckload volume.		B <sup>7/</sup>	C	D	E
21. They exclude the transportation of unusual type commodities.		B <sup>7/</sup>	C	D	E
22. They do not handle shipments requiring special care.		B <sup>7/</sup>		D	E
23. REXCO operates, in effect, simply as a broker of irregular-route transportation of truckload quantities.	A		C <sup>8/</sup>	D <sup>8/</sup>	E <sup>8/</sup>

Footnotes To Table - Appendix B

1. Complainants, who subpoenaed the General Manager and required his presence throughout the proceeding, did not call him to testify. cf. J.A. 250
2. Of the thousands of shipments reviewed there were only six points: Fenwick, W. Va; Stephens City, Va; Huguenot, N.Y.; New London, Tex; Trumbauersville, Pa; and Elverson, Pa; which complainants argued were not authorized points. J.A. 643, Ex. 20
3. The negative was not proven. The drivers were instructed to use interstate routes. They were otherwise instructed. The record shows only 14 instances from more than 6,000 shipments reviewed by the Bureau where actual operations did not traverse regular routes. (Ex. 19, App. A, cf. REA Brief, Index 115, pages 53-54).
4. The record is replete with discussions of the contents and requirements of the manifest packets which work as a control device on drivers. The record shows considerable action to control the drivers and the handling of shipments.



5. The record only shows 5 isolated examples of interruptions in service. J.A. 506-508 cf. REA Brief, Index 115, pages 50-52 to describe and explain even those examples.
6. There is no requirement that express service be provided through the use of only ordinary van equipment, cf. REA Brief, Index 115, p. 94. TR2069. The limitation is on commodities which can be transported in ordinary van equipment. Transportation Activities of Arrowhead Transportation Co., 63 M.C.C. 573 (1955)
7. There is no legal requirement that no express service can be provided unless all services on all sizes and all types of commodities are simultaneously handled. The Report here in issue so recognized. J.A. 726 lines 16-30
8. REA was not charged with being an unauthorized broker. There is no legal prohibition against an express company, REA, or any motor carrier using leased equipment, leased drivers, or owner-operators. The Commission's Report and Orders fail to make findings supported by the record to sustain a finding that REA is an unauthorized broker.